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No. 97-638

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON who are Members of Syndicate No. 553, as Subscribers to Contracts of Reinsurance with Transit Casualty Company, and C.J. Warrilow, an Underwriter at Lloyd's of London, Individually, and on behalf of Certain Underwriters at Lloyd's of London who are Members of Syndicate No. 553,

Petitioners,

vs.

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. § 1447(d) forbid appellate review of a remand order concluding that the district court lacked removal jurisdiction under 9 U.S.C. § 205 (1994) when the sole basis for removal, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, did not apply, and that substantive decision was not separable or apart from the jurisdictional decision?

LIST OF PARTIES

Petitioners have failed to identify one additional party to the underlying proceedings: C.J. Warrilow, in his individual capacity as Petitioners' active or lead underwriter. As the lead underwriter, Mr. Warrilow is potentially liable on a separate basis for any judgment entered in this matter.

Respondent Transit Casualty Company in Receivership is an insolvent insurance company and it has no parent or subsidiary companies.

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TREATIES AND STATUTES

Missouri Anti-Arbitration Statutes.

The Missouri legislature has passed two anti-arbitration statutes relevant to this action. One statute precludes arbitration in all insurance contracts.[1] It served as the basis for the district court's remand order. It provides:

> A written agreement to submit any existing controversy to arbitration . . . **except contracts of insurance** and contracts of adhesion . . . is valid, enforceable and irrevocable. . . .

Mo. Ann. Stat. § 435.350 (Vernon 1992) (emphasis added). The other statute is applicable only to insurance insolvencies. On remand, the state court denied Petitioners' motion to compel arbitration based on this statute. Petitioners appealed that order. The appeal is pending in the Missouri Court of Appeals. The second statute provides:

> Upon issuance of an Order Appointing a Liquidator of a Domestic Insurer . . . **no action** at law or equity or **in arbitration shall be brought against the reinsurer or liquidator**, whether in this state or elsewhere. . . .

Mo. Ann. Stat. § 357.1188.1 (Vernon 1991) (emphasis added).

STATEMENT OF THE CASE

Respondent, Transit Casualty Company in Receivership (Transit), was organized and incorporated under the laws of the State of Missouri in 1945. On December 3, 1985, the Circuit Court of Cole County, Missouri (state court) declared that Transit was insolvent pursuant to Mo. Ann. Stat. § 375.660, *et seq.* (Vernon 1991), and the Amended Order of Liquidation and Appointment of Permanent Receiver (Liquidation Order) filed in Cause No. CV185-1206CC. (Resp.

---

[1] Lloyd's notes that this statute was recently revised to permit arbitration of reinsurance agreements. (Pet. Br. 3, n. 2.) This change in the law affects whether this case is worthy of this Court's consideration. *See* discussion *infra* at 27-28.

App. A1-A4.) The Transit liquidation involves over 200,000 creditor-claimants and over 900 reinsurers. It is also the largest and controlling creditor of the largest insurance insolvency in British history.

Reinsurance recoveries are the principal asset of the Transit estate. Section 375.660 of the Missouri Insolvency Code, Mo. Ann. Stat. § 375.660 (Vernon 1991), requires the Director of the Department of Insurance (Director or receiver), as statutory receiver of Transit, to "take immediate possession of the assets, books and papers of [Transit]." The Missouri insolvency laws also authorize the receiver to collect all debts and moneys due and claims belonging to Transit and to do all acts as are necessary or expedite collection or protection of Transit's assets. Mo. Ann. Stat. § 375.1182 (Vernon 1991). All of the assets of an insolvent insurer vest in fee simple and absolutely in the Director, as statutory receiver, and in his or her successor(s) in office, to hold and dispose of the assets for the benefit of creditors and policyholders. Mo. Ann. Stat. § 375.650 (Vernon 1991). The assets of Transit to which the receiver is entitled are subject to the jurisdiction and orders of the state court and the insurance insolvency laws of Missouri.[2] In addition, the Liquidation Order permanently enjoins all persons from interfering with the possession, title or rights of the receiver. (Resp. App. A2 at ¶ 8.) The Liquidation Order also enjoins all persons from interfering with the liquidation of Transit. (*Id.*)

To date, Transit has marshalled over $900 million in assets, mostly in the form of monies paid to it by reinsurers for allowed claims that policyholders and third-party claimants have filed against Transit's estate. Some of the casualty

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[2] The Liquidation Order further authorizes the Receiver to "do all things necessary to effectuate the winding up and liquidation" of Transit. (Resp. App. A3 at ¶ 14.) Mo. Ann. Stat. § 375.1182.3 (Vernon 1991) also states that the Receiver's powers are not limited to those enumerated, but also include any acts "necessary or appropriate for the accomplishment or in aid of the purpose of liquidation."

risks insured by Transit were reinsured with Petitioners, Certain Underwriters at Lloyd's of London (Lloyd's), pursuant to the reinsurance agreements between the parties.

Statement of Additional Procedural Facts

Respondent generally agrees with the Petitioner's statement of the procedural background of this case. However, Respondent provides the following additional information.

Transit filed its petition and motion to show cause on December 21, 1995 in Cause No. CV595-2CC in the state court. (Resp. App. B1.) On December 22, 1995, the state court ordered Lloyd's to appear before it approximately two months later for a show cause hearing. (Resp. App. C1-C2.) During the conference call held shortly before the scheduled hearing, Lloyd's counsel requested ninety days to investigate Transit's claims, review records, and consult with his client before Lloyd's would be able to comply with the Show Cause Order. The state court granted this extension, to May 20, 1996, based on the representations by Lloyd's counsel that the delay was being requested in good faith. (Resp. App. D1-D2.) Six months after Transit filed its action and shortly before the expiration of the extension granted by the state court, Lloyd's removed the case to federal district court pursuant to 9 U.S.C. § 205 (1994), a special removal statute found in the legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. June 10, 1958, 21 UST 2517, TIAS No. 6997.

On June 5, 1996, the district court remanded the matter to the state court and denied a stay of the order pending appeal. The ruling was based on two grounds. First, the McCarran-Ferguson Act (the McCarran-Ferguson Act), 15 U.S.C. § 1011-15 (1945), saved from preemption Missouri's anti-arbitration statute found at Mo. Ann. Stat. § 435.350 (Vernon 1992). As a result, the Convention did not apply and removal was not appropriate under 9 U.S.C. § 205. (C3-C6.) Second, under the service-of-suit clause found in the reinsurance agreements, Lloyd's had waived its right to remove. Instead,

it had contractually agreed to litigate in a court of Transit's choosing. (C6-C8.)

Following remand, the parties continued to litigate in the state court action. (Resp. App. B5-B13.) Both parties have conducted extensive discovery and the state court has required Lloyd's to post $8.3 million in pre-answer and contractual security for amounts due Transit. (Resp. App. H1-H3.)

Lloyd's has left the impression that it moved to compel arbitration in the federal district court. In fact, it did not. Instead, Lloyd's filed a motion to dismiss the suit under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief could be granted. (Resp. App. E1-E3.) The only relief requested by Lloyd's was dismissal of the petition. (Resp. App. E3.) The district court denied the motion as moot. (B1.)[3] Thus, at the time the district court ruled on Transit's motion to remand, Lloyd's had not made an affirmative effort to enforce any arbitration right it may have had under the reinsurance agreements. On July 18, 1996, Lloyd's for the first time in any proceeding filed a motion to compel arbitration in the state court. (Resp. App. E5-E8.) On July 19, 1996, the state court denied the motion to compel arbitration, finding that the language of Art. XVII of the reinsurance agreements controlled, that Missouri's anti-arbitration statute found at Mo. Ann. Stat. § 375.1188.1 (Vernon 1991) precluded arbitration in insurance insolvencies and that the matters were *sui generis* to the court. (Resp. App. F7-F8.) That ruling is currently on appeal to the Missouri Court of Appeals. (Resp. App. F1-F8; G5-G6.) By consent of the parties, the matter has been referred to a special master for further proceedings, including trial. (Resp. App. B10.)

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[3] Unlike in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed.2d 244 (1934), and some of the cases more fully discussed *infra* at 10-11, the district court did not rule on a separate motion that might serve as a basis for appellate review.

Relevant Contract Language.

All three of the reinsurance agreements between the parties contain the following provisions:

Art. XVII – Service of Suit Clause

> In the event of the **failure of the Reinsurer to pay an amount claimed to be due** hereunder, the **Reinsurer will**, at the request of the Reinsured, **submit to the jurisdiction of any court of competent jurisdiction** with the United States and will comply with all requirements necessary to give **such court** jurisdiction and all matters shall be determined in accord with the law and practice of **such court**.
>
> [I]n any suit instituted against the Reinsurer under this Agreement the Reinsurer will abide by the final decision of **such Court** or of any reviewing Court.

(Resp. App. I1-I2; Emphasis added.)

Art. XXII – Arbitration Clause

> All disputes or differences arising out of this Agreement shall be submitted to the decision of two Arbitrators . . . and in the event of the Arbitrators failure to agree, to the decision of the Umpire to be chosen by the Arbitrators.

(Resp. App. I5.)

REASONS FOR DENYING THE WRIT

I

Lloyd's removed this case from the state court solely pursuant to 9 U.S.C. § 205, a special, limited provision of the Federal Arbitration Act (FAA), which implements the Convention and permits removal of cases "relat[ing] to an arbitration agreement . . . falling under the Convention." Thus, removal was based on this federal statute and not on diversity jurisdiction or a federal question.

Given the fact that removal to a federal court deprives the state court of jurisdiction, "[d]ue regard for the rightful

independence of state governments requires that federal courts scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Finley v. U.S.*, 490 U.S. 545, 552-53, 109 S.Ct. 2003, 2009, 104 L.Ed.2d 593 (1989) (citations omitted). Removal statutes are to be construed narrowly. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941).

Lloyd's argues that the ruling of the Eighth Circuit, in which it interpreted the district court's remand order as holding that the court lacked subject matter jurisdiction (A11.), "flies in the face of this Court's decision in *Waco*." (Pet. Br. 6.) Lloyd's contends that the district court's ruling was simply a predicate for remand which is not immune to review. (Pet. Br. 9.) Lloyd's further argues that the "predicate question decided by the court was distinct from the question of its subject matter jurisdiction." (Pet. Br. 11.) Lloyd's also suggests, for the first time, that a remand pursuant to 9 U.S.C. § 205 is not subject to general removal law found at 28 U.S.C. §§ 1441-1452. (Pet. Br. 11.)[4]

In the district court, Transit acknowledged that Article II of the Convention required recognition of an arbitration agreement "concerning a subject matter capable of settlement by arbitration." Section 3 of Article II, however, instructs that "the court . . . shall . . . refer the parties to arbitration, **unless it finds that the said agreement is null and void, inoperable or incapable of being performed**." (D1, emphasis added.) See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (hereinafter RESTATEMENT) § 487, comments d and e; § 488, comment c. See generally G. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition*

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[4] Section 205 expressly provides, with an exception not relevant to this case, that "[t]he procedure for removal of causes otherwise provided by law shall apply. . . . " This language renders applicable the provisions of 28 U.S.C. § 1447 (c) and (d). (A14.)

and Enforcement of Foreign Arbitral Awards, 3 SOUTHWESTERN UNIVERSITY LAW REVIEW 1-14 (1971) (hereinafter Aksen); L. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE LAW JOURNAL 1047, 1060-1064 (1961) (hereinafter Quigley).

Transit argued that the Missouri anti-arbitration statute, Mo. Ann. Stat § 435.350 (Vernon 1992), was saved from preemption by the McCarran-Ferguson Act. *See U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). Accordingly, the statute rendered the parties' arbitration agreements null and void, inoperable or incapable of being performed under the exception found at Article II(3) of the Convention. An inoperable agreement cannot trigger the Convention or its implementing legislation. Otherwise stated, section 205 could not confer removal jurisdiction on the district court if the arbitration agreement was inoperable or unenforceable.[5]

The district court engaged in a careful analysis of the inverse preemption issue and found that "[i]n the present action, there clearly exists a state statute which precludes the enforcement of arbitration in insurance contracts." (C6.) The district court also considered Transit's argument that Lloyd's had waived its right to remove by including a forum-selection clause in the reinsurance agreements. The district court found that "[a]s a matter of contract interpretation, this court has determined that the legal effect of the clause contained in the reinsurance agreements at issue is to waive defendants right to remove." (C6.)

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[5] Transit also argued that the reinsurance agreements did not require arbitration of a "failure to pay an amount claimed due," as the more specific Service-of-Suit clause found in the agreements provided. (Resp. App. I1-I2.) This more specific clause superceded and controlled the more general arbitration clause. (Resp. App. I5.) The more specific clause allowed Transit to bring suit in court for this particular contractual breach.

The Eighth Circuit first reviewed this Court's precedent governing appellate review of remand orders including *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). It concluded that: "Thus, if the district court believed that it lacked subject matter jurisdiction at the time of removal, review of the remand order is barred under § 1447(d)." (A10, citations omitted.) Importantly, the circuit court disagreed with Lloyd's assertion that the remand order was a collateral order that conclusively determined a disputed question that was completely separate from the merits of the action. (A11.) The circuit court instead found that:

> The district court determined that the McCarran-Ferguson Act's inverse preemption prevented the parties' reinsurance agreements from governance by the Convention. Because the parties' reinsurance agreements must fall under the Convention in order for underwriters to remove under 9 U.S.C. § 205, the district court's finding that the Convention does not apply to this cause of action resulted in lack of removal jurisdiction and necessitated remand.

(A11-A12, citations omitted.) The court also found that the district court cited 28 U.S.C. § 1447(c) in its remand order. (A12; *see also* C2-C3.)[6]

In its Petition for Writ of Certiorari, Lloyd's suggests that this case is one of the special cases that fall within one of the few, narrow exceptions that this Court and circuit courts have fashioned concerning the review of certain remand or remand-related orders. To do so, however, Lloyd's has had to mischaracterize the district court's ruling as a two-stage ruling involving a remand order based on the resolution of the merits of some matter of substantive law. (Pet. Br. 7.) Lloyd's argues that "[t]he flaw in the Eighth Circuit's independent

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[6] The Eighth Circuit recognized that the citation was "somewhat ambiguous" and looked past the reference to determine the true basis for the remand decision. (A12.) It found that the basis for the remand was lack of subject matter jurisdiction. (*Id.*)

conclusion that the remand order was based on a lack of subject matter jurisdiction lies in its failure to recognize that a district court's jurisdiction to entertain a petition to enforce an arbitration agreement under the Convention and the petitioner's entitlement to the relief sought are separate and distinct questions." (Pet. Br. 7-8.)

In short, Lloyd's asks this Court to find that, if a district court rules that it lacks subject matter jurisdiction, it has necessarily ruled on a substantive issue subject to appeal. If Lloyd's is correct, 28 U.S.C. § 1447(d) is a nullity as all remand orders based on a lack of subject matter jurisdiction will be appealable. The exception will swallow the rule.

Furthermore, the issue posed by Lloyd's does not exist here. Lloyd's never presented to the district court a "petition to enforce an arbitration agreement." The district court was simply asked to determine whether it had removal jurisdiction under 9 U.S.C. § 205. As more fully discussed below, this analysis involves only one question.

Exceptions Permitting Appellate Review do not Apply

In mischaracterizing the district court's order as a two-staged analysis, Lloyd's relies on the *Pelleport/Clorox* doctrine. (Pet. Br. 7.) In *Pelleport Investors, Inc. v. Budco Quality Theaters*, 741 F.2d 273, 276 (9th Cir. 1984), a remand based upon the district court's resolution of "a substantive [issue] on the merits apart from any jurisdictional decision" is a reviewable final order. The remand in *Pelleport* – a diversity case – was not based on lack of subject matter jurisdiction or any defect in removal (as in this case) but, rather, on the court's determination that the parties' forum-selection clause was enforceable. The Ninth Circuit found that to immunize this variety of remand orders from review "would deprive [the objecting party] of its right to appeal a substantive determination of contract law," a determination that was conclusive on the parties. *Id.* at 277. Lloyd's relies on five forum selection or waiver cases in arguing that review is

proper. (Pet. Br. 7.) However, this line of cases does not apply.

First, the district court did not resolve a substantive issue on the merits "apart from any jurisdictional decision." Instead, the substantive issue was intrinsic to the decision to remand based on lack of subject matter jurisdiction. Second, as the Eighth Circuit noted, the district court's ruling on the forum selection clause did not provide a basis for appellate review. (A15.) It was *dicta*. "Once the district court determined that the Convention did not apply and therefore removal jurisdiction was lacking, there was no need to rule on the receivership's contention that the underwriters had contractually waived any removal rights." (*Id.* at A16) In *Pelleport*, the forum selection clause was the reason for remand, even when diversity jurisdiction continued to exist. Here, the clause was secondary. By including it in the order, the district court made it clear that the case would otherwise be remanded. Lloyd's entire appeal on this jurisdictional issue only delays the inevitable.

An easily identified sub-set of the "substantive decision" doctrine, involves review of a ruling on a separate motion. A number of circuits,[7] relying on this Court's decision in *Waco* and the *Pelleport/Clorox* doctrine, have permitted appellate review of a **separate order** that "in logic and in fact . . . **preceded** that of remand and was made by the District Court while it had control of the cause" even if the separate order resulted in an order to remand. *Waco*, 293 U.S. at 143 (emphasis added). These cases do not apply to this case either. The district court remanded the case based on lack of subject matter jurisdiction and then denied Lloyd's motion to

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[7] *See, e.g., Kozera v. Spirito*, 723 F.2d 1003 (1st Cir. 1983) (review of order dismissing party); *Ariota v. Graham*, 984 F.2d 1350 (3d Cir. 1993) (review of order striking substituted party); *Southeast Mtg. Co. v. Mullins*, 514 F.2d 747 (5th Cir. 1975) (review of order dismissing third-party complaint); *Gallea v. U.S.*, 779 F.2d 1403 (9th Cir. 1986) (review of order dismissing U.S. as party).

dismiss as moot. (B1.) The **remand order preceded** "in logic and in fact" the ruling on the motion to dismiss. Moreover, the district court's ruling was not "conclusive." *Waco*, 293 U.S. at 143. Indeed, Lloyd's own actions admit this fact as after remand, Lloyd's filed a motion to compel arbitration, which was denied. (Resp. App. E5-E8; F7-F8.) Lloyd's then filed an appeal with the Missouri Court of Appeals. (Resp. App. F1-F8.) That appeal is currently pending. (Resp. App. G5-G6.) Thus, Lloyd's has not been denied consideration or appeal of its arbitration rights.

Lloyd's also cites *In re TMI Litigation Cases*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992) in support of its argument that a court may review a remand order if it is "based on a resolution of the merits of some matter of substantive law." (Pet. Br. 7.) In that case, the Third Circuit concluded it had authority to review a remand order which was based on the district court's belief that the statute vesting federal courts with jurisdiction over certain public liability actions was unconstitutional. The court acknowledged that the district court had remanded the case for what it saw as a lack of subject matter jurisdiction. Accordingly, unlike the *Pelleport* line of cases, the district court's "substantive decision" was not "apart from any jurisdictional decision." *In re TMI*, 940 F.2d at 843. Even though the "heart of this decision was jurisdictional" (*id.*), the Third Circuit believed that Congress never intended that section 1447(d) would bar review of a "jurisdictional determination . . . resting . . . upon the conclusion that the entire statutory scheme authorizing removal is unconstitutional." *Id.* at 845. The court stated: "In enacting section 1447(d), Congress did not intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes." *Id.* at 843. This case is wholly distinguishable. The district court's remand order in the case at bar raises no constitutional issue. Lloyd's did not argue that the entire statutory scheme was unconstitutional. Moreover, the "heart of the [remand] decision was jurisdictional."

A third line of cases governs the review of remand orders raising preemption concerns.[8] The majority of circuits have found that they lack jurisdiction to review these orders.[9] The Eighth Circuit, in dismissing Lloyd's appeal, cited several of these cases. (A12-A13.) These cases find that the preemption ruling is not separable from the jurisdictional determination. In this case, the district court's analysis of the "inverse preemption" issue was identical, in effect, to the preemption analysis discussed in the following paragraphs. It is not a

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[8] When a defendant removes based on "complete preemption" under ERISA section 502, 29 U.S.C. § 1132(a), a district court may dismiss the preempted claim or it may require the plaintiff to plead his complaint as an ERISA claim. On the other hand, if the district court finds that there is no "complete preemption," the court will remand the case. The section 514 preemption defense, 29 U.S.C. § 1144(a), nonetheless is still alive and the state judge will decide if it applies.

[9] *See Gonzalez-Garcia v. William Dickie Manuf. Co.*, 99 F.3d 490 (1st Cir. 1996) (district court found ERISA did not completely preempt state law claims and remanded; appellate court ruled that § 1447(d) barred its review); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321-322 (4th Cir. 1993) (same; ERISA); *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) ("The preemption inquiry here, unlike an inquiry into the enforceability of a forum-selection clause, necessarily 'related to the question of jurisdiction;' " § 1447(d) barred appellate review); *Carney v. BIC Corp.*, 88 F.3d 629, 632 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 113 S.Ct. 738, 136 L.Ed.2d 677 (1997) ("Although the district court applied Mo. Rev. Stat. § 537.762(6) in reaching its conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination;" § 1447(d) barred review); *In re Business Men's Assur. Co. of America*, 992 F.2d 181 (8th Cir. 1993) (same as in *Nutter*); *Glasser v. Amalgamated Workers Union*, 806 F.2d 1539, 1540 (11th Cir. 1986) (preemption inquiry was undeniably "related to the question of jurisdiction [rather than] the substantive rights of the parties.")

The Eighth Circuit cited *Whitman*, *Solely*, *Carney*, *Baldridge*, and *Business Men's Assurance* in support of the dismissal of the appeal in this case.

two-staged analysis, but integrated with, and essential to, the jurisdictional determination.

The Ninth Circuit – the source of the *Pelleport* "substantive decision" exception to section 1447(d) – has declined to review remand orders based on a conclusion that federal law did not completely preempt claims that had been pleaded as state law causes of action. *See Whitman v. Raley's, Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989) (cited by the Eighth Circuit) and the companion case of *Krentz v. Conn. Gen. Life Ins. Co.*, 886 F.2d 1177 (9th Cir. 1989). The question in these cases was "whether in the process of making [the remand] decision on the basis of the lack of federal preemption, a substantive law determination was made that would bring these cases within the *Clorox* exception." *Whitman*, 886 F.2d at 1180. According to *Whitman*, when a district court, ruling on the removal of a suit alleging state law violations, decides whether "Congress intended a preemptive force so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action," the court has considered only a jurisdictional issue. *Id.* at 1180-81. The focus is "on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the . . . complaint identifies only state claims." *Id.* at 1181. This jurisdictional inquiry, the *Whitman* court explained, is distinct from the question whether a legal defense of preemption may be raised. Whether the defendant has a valid preemption defense "would be a matter for trial" by a court that has concluded it has jurisdiction over the case. *Id.* Since the remand orders in *Whitman* and *Krentz* were based on a determination that there was no complete preemption and thus no subject matter jurisdiction, the orders were not reviewable under § 1447(d).

The Fifth Circuit found a similar order unreviewable. *Soley v. First National Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991) (cited by the Eighth Circuit). The court took "comfort" in the knowledge that interpreting the order as purely jurisdictional "will have no preclusive effect on the

state court's consideration of the substantive preemption defense." *Id.* at 409. It also found that the substantive preemption decision did not "necessarily precede[ ]" the decision to remand. As a result, the decision in *Waco* did not apply. *Soley*, 923 F.2d at 409-410.

Several more cases are worth noting in that they hold, as the Eighth Circuit did in this case, that an appellate court may not review a remand order determining that a special statute does not confer removal jurisdiction. In *Severonickel v. Gaston Reymenants*, 115 F.3d 265 (4th Cir. 1997), the district court remanded a case removed pursuant to 9 U.S.C. § 205 when the defendant failed to prove that a binding arbitration agreement existed. The Fourth Circuit found that the district court had remanded for lack of subject matter jurisdiction. Accordingly, section 1447(d) barred review.[10]

In *Calderon v. Aerovias Nacionales de Columbia*, 929 F.2d 599 (11th Cir. 1991), the appellate court held that 1447(d) barred review of a district court's remand after the court determined that the Warsaw Convention did not confer federal question jurisdiction. Defendants contended that the district court had resolved a substantive issue (that the Warsaw Convention did not preempt the plaintiff's state law

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[10] Lloyd's cites *Severonickle v. Gaston Reymenants*, 115 F.3d 265 (4th Cir. 1997) as evidence that a "number of federal circuits have recognized that adjudication of a petition to compel arbitration involves this two step analysis." (Pet. Br. 8.) In fact, the Fourth Circuit found that the district court had "only one question to decide." 115 F.3d at 268. That question was whether the removing party "had failed to carry his burden of establishing the existence of a valid and applicable arbitration agreement which would support federal jurisdiction." *Id. Jain v. de Mere*, 51 F.3d 686 (7th Cir. 1995) and *Quasem Group, Ltd. v. W.D. Mask Cotton Co.*, 967 F. Supp. 288 (W.D. Tenn. 1997), on which Lloyd's also relies, did not involve removal. Thus, they cannot resolve the issue of whether the district court's decision was a separate decision apart from the jurisdictional decision. Similarly, in *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (2d Cir. 1982), the case was removed under the Convention. However, the court granted the motion to compel arbitration and dismissed the complaint. No remand order was involved.

claims) before issuing the remand. The appellate court held that the substantive issue was not separable from the decision to remand. It was "intrinsic to the . . . decision to remand for lack of subject matter jurisdiction." *Id.* at 602.

In *Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993), the defendant removed claiming to be an instrumentality of a foreign sovereign subject to the Foreign Sovereign Immunities Act (FSIA). The district court held that the defendant had failed to establish that the FSIA applied. The appellate court dismissed the appeal finding that § 1447(d) barred review. Among other things, the court noted:

> Section 1447(d) predated FSIA and its removal provision, but Congress made no exception for appellate review of a remanded FSIA case, as it has done for civil rights and FDIC cases. See 28 U.S.C. § 1447(d); 12 U.S.C. § 1819(b)(2)(C).

See also, *Linton v. Airbus Industries*, 30 F.3d 592 (5 Cir. 1994) (FSIA did not create federal jurisdiction and remand order was not reviewable).

In short, the district court's ruling in the case at bar, "rather than being apart from the question of subject matter jurisdiction [was] necessary to determine whether such [removal] jurisdiction existed." *Gonzalez-Garcia*, 99 F.3d at 491-492, citing *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1388 (9th Cir. 1989) (same; ERISA) and *Nutter*, 4 F.3d at 321. The inverse preemption analysis was "in no way separate from the jurisdictional determination." *Carney*, 88 F.3d at 631. As the Eighth Circuit correctly concluded, the district court's determination was not "separate from the jurisdictional determination." (A13.) It found that "the district court's consideration of Missouri's arbitration statute in concluding that the parties' reinsurance agreements are not subject to the Convention was necessary to determine whether removal jurisdiction existed." (*Id.*)

Finally, Congress could have easily included a provision in 9 U.S.C. § 205 creating a right of appeal. It did not do so. *See Mobil Corp.*, 984 F.2d at 666; *In re Resolution Trust*

Corp., 888 F.2d 57, 58 (8th Cir.1989), *vacating*, *In re Fed. Savings and Loan Ins. Corp.*, 881 F.2d 564 (8th Cir. 1989). Thus, the Eighth Circuit correctly found that § 1447(d) bars review of the remand order based on lack of subject matter jurisdiction.

II

The Missouri state court has exclusive jurisdiction in this liquidation proceeding.[11] "The statutory scheme for . . . liquidation of an insurance company . . . sets up a self-contained and exclusive statutory scheme." *State ex rel. ISC Fin. Corp. v. Kinder*, 684 S.W.2d 910, 913 (Mo. App. 1985), cited in *In Re Transit Casualty. Co.*, 900 S.W.2d 671, 675 (Mo. App. W.D. 1995).

The purpose of the Missouri insurance insolvency code is "to regulate the insurance business from beginning to end, not alone in the case of solvency, but in the case of insolvency of the company as well." *O'Malley v. Prudential Casualty & Sur. Co.*, 80 S.W.2d 896, 897 (Mo. App. 1935). "Statutes providing for the liquidation of insolvent insurance companies are designed to protect creditors, policyholders and the general public by providing a comprehensive and efficient means for collecting the insolvent's assets and equitably paying the

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[11] *See Motlow v. So. Holding & Sec. Corp.*, 95 F.2d 721, 725-26 (8th Cir.), *cert. denied*, 305 U.S. 609, 59 S.Ct. 68, 83 L.Ed.2d 388 (1938) ("Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of assets of an insolvent corporation for the benefit of all creditors . . . , it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts . . . are excluded from participation."); *State ex rel. Melahn v. Romines*, 815 S.W.2d 92, 94 (Mo. App. E.D. 1991) ("any action involving the receivership proceeding must be pursued in the receivership court"). *See also* Mo. Ann. Stat. § 375.1176.1 (Vernon 1991 and Supp. 1997), which provides that the liquidator shall administer the assets of the insolvent insurer "subject to the supervision of the [state] court until the liquidator is discharged by the court.").

claims of creditors." *In the Matter of Transit Casualty Co.*, 79 N.Y.2d 996, 594 N.E.2d 929, 584 N.Y.S.2d 435 (Ct. App. 1992).

In turn, the majority of courts have held that an insurance company's liquidator cannot be compelled to arbitrate. Courts have repeatedly held that state statutes establishing the exclusive jurisdiction of state courts or preventing an insurance liquidator from participating in arbitrations are protected under the McCarran-Ferguson Act from preemption by the FAA. *See, e.g., Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co.*, 1987 WL 28636 at *1 (S.D.N.Y. Dec. 11, 1987) ("The great weight of authority holds that state-appointed liquidators . . . cannot be compelled to arbitrate claims arising out of insurance policies.")[12]

Lloyd's faces additional hurdles in attempting to compel arbitration pursuant to the Convention. All the courts that have considered the issue have ruled that the Convention does not apply to require arbitration with the liquidator of an insolvent insurance company. *See Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (applying state anti-arbitration statute in insurance insolvency to preclude arbitration under

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[12] *See also U.S. Financial Corp. v. Warfield*, 839 F. Supp. 684, 689 (D. Ariz. 1993) (*Fabe, supra*, controlled finding that state statute vested exclusive jurisdiction in the liquidation court); *Washburn v. Corcoran*, 643 F. Supp. 554 (S.D.N.Y. 1986) ("All proceedings in liquidation [should] be unified under the single management of the court to ensure economical, efficient and orderly liquidation"); *Albany Ins. Co. v. Wright*, Cause No. 85-CI-0591, slip op. (Franklin County Cir. Ct., Kent. Feb. 4, 1994) (Liquidation Act is not superseded by the FAA; liquidator cannot be compelled to arbitrate); *Union Indemnity Ins. Co. v. American Centennial Ins. Co.*, 137 Misc.2d 575, 521 N.Y.S.2d 617 (Sup. Ct. 1987) (exclusive jurisdiction is vested in the receivership court, therefore, arbitration was "inappropriate and would only lead to piecemeal determination of the relevant issues and possible duplication of efforts and inconsistent results. . . . "); *Knickerbocker Agency, Inc. v. Holz*, 4 A.D.2d 71, 162 N.Y.S.2d 822 (N.Y.A.D. 1957), *aff'd*, 4 N.Y.2d 245, 149 N.E.2d 885, 173 N.Y.S.2d 602 (1958) ("The Legislature never contemplated turning over liquidation proceedings . . . to private arbitrators.").

the Convention); *Corcoran v. Ardra Ins. Co., Ltd.*, 77 N.Y.2d 225, 567 N.E.2d 969, 566 N.Y.S.2d 575 (Ct. App. 1990), *cert. denied*, 500 U.S. 953, 111 S.Ct. 2260, 114 L.Ed.2d 712 (1991) (finding that the New York insurance insolvency law did not permit the liquidator to participate in arbitration proceedings under the Convention); *Corcoran v. AIG Multi-Line Syndicate, Inc.*, 167 A.D.2d 332, 562 N.Y.S.2d 933 (N.Y. 1990) (exclusive jurisdiction is vested in the court supervising the liquidation so as to preclude arbitration under the FAA and the Convention), *reversing*, 143 Misc.2d 62, 539 N.Y.S.2d 630 (Sup. Ct. 1989); *Ideal Mut. Ins. Co. v. Phoenix Gen. Inc. Co.*, 1987 WL 28636 at *1 (S.D.N.Y. Dec. 8, 1987) (McCarran-Ferguson Act ousts provisions of FAA; "Convention . . . does not alter that result.").

The Convention "contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi Motor Corp. v. Soler Chrysler – Plymouth, Inc.*, 473 U.S. 614, 639 n.21, 105 S.Ct. 3346, 3360 n.21, 87 L.Ed.2d 444 (1985). Courts are directed to consider "whether legal constraints external to the parties' agreement foreclose[s] the arbitration of these claims." *Id.* at 628.

Secretary of State Katzenbach noted in recommending accession to President Johnson and the Senate,[13] that the Convention exceptions "provide substantial safeguards to American citizens against any misuse of the arbitration process." S. Exec Doc. E, 90th Cong., 2d Sess. 4 (1968). The same document noted that the non-arbitrability provision of Art. V(2)(a) and the public policy exemption of Art. V(2)(b) "would give the courts to which application is made considerable latitude in refusing enforcement." *Id.* at 21.

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[13] Congress' consent to accession should be viewed in the light of the State department's interpretation that was before it at the time. These interpretations are entitled to great weight in interpreting the treaty. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982).

Similarly, at the September 20, 1968 hearing before the Committee of Foreign Relations, Senator Sparkman asked Richard Kearney the following question: "Does this seek in any way to extend Federal jurisdiction into areas not now within Federal jurisdiction?" Appendix to Exec. Rep. No. 10, 90th Cong., 2d Sess. 7 (1968). Kearney replied: "No, Senator." (*Id.*) In a later hearing held on February 9, 1970, Chairman Fulbright asked: "And [the Convention] does not alter or change a citizen's rights under State laws?" Kearney replied: "Not at all." Fulbright followed by asking: "Does it in any way broaden Federal authority?" Kearney replied: "Not basically. It provides for the right of removal to the district court from the state court in a case that falls under the Convention." Appendix to S.Rep. No. 91-702, 91st Cong., 2d Sess. 10 (1970). Kearney also explained that:

> [O]ur purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign commerce of the U.S. and not make any changes with respect to matters that are traditionally within the jurisdiction of the 50 states of the Union.

Id. at 6. At the time he made this statement, regulation of the business of insurance had been ceded to the states for twenty-five years under the McCarran-Ferguson Act.

The Convention contains several pre-conditions and exceptions that apply to this matter. As a result, 9 U.S.C. § 205 cannot serve as a basis for removal jurisdiction.[14]

Transit's Disputes are Not Capable of Settlement by Arbitration.

Article II(1) of the Convention provides that it applies to an agreement "concerning a subject matter capable of settlement by arbitration." (D1.) *See also* RESTATEMENT § 487, comments d and e; § 488, comment c.[15] First, Transit asserts

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[14] These enforcement exceptions are recognized at 9 U.S.C. § 207.

[15] Quigley, *supra* at 1064, notes that the determination of arbitrability

that none of the claims against Lloyd's are capable of settlement by arbitration simply by virtue of the fact that Transit is now in statutory liquidation.[16] The RESTATEMENT notes that:

> [T]he law of most states regards certain kinds of issues as not subject to arbitration . . . [including] public law issues such as . . . matters as to which particular legislation has been enacted for the protection of certain parties.

RESTATEMENT § 488, Rptr's note 1. *See also* Aksen, *supra*, at 13.

In this case, the United States has particular legislation – the McCarran-Ferguson Act – which cedes to the states the regulation of the business of insurance, including the liquidation of insurance companies.[17] Missouri, in turn, has passed specific legislation to regulate the liquidation of insurers. It is designed to protect the insolvent's policyholders, its creditors and the public. It prevents a party from compelling the liquidator to arbitrate. Mo. Ann. Stat. §§ 435.350 (Vernon 1992) and 375.1188.1 (Vernon 1991 and Supp. 1997). In *Corcoran v. Ardra Ins. Co., Ltd.*, 77 N.Y.2d 225, 233, 567 N.E.2d 969, 973, 566 N.Y.S.2d 575, 579 (Ct. App. 1990), *cert. denied*, 500 U.S. 953 (1991), New York's highest court found that claims arising out of reinsurance agreements were not capable of settlement by arbitration under the Convention when the state insolvency law precludes arbitration. Accordingly, the court

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is to be made in accordance with the law to which the parties subjected their agreement. Two of the reinsurance agreements provide that Missouri law applies (Resp. App. I4.); one agreement provides that California law applies. (*Id.*) In the context of insolvency, however, Missouri courts have held that Missouri law controls because it is the state of Transit's incorporation and domicile. *Allendale Mut. Ins. Co. v. Melahn*, 773 F. Supp. 1283, 1286 (W.D. Mo. 1991).

[16] *See* cases cited, *supra* at nn. 11-12.

[17] *Fabe*, 508 U.S. at 500, 113 S.Ct. at 2207, 124 L.Ed.2d at 499.

did not apply the Convention and the liquidator could not be compelled to arbitrate.

The Missouri legislature conferred exclusive jurisdiction on the state court to resolve disputes relating to the assets of an insolvent insurer, permitted the court to protect its exclusive jurisdiction by issuing injunctions, if necessary,[18] and also enacted an anti-arbitration statute to ensure that the state court, not arbitral tribunals, would resolve disputes involving an insolvent insurer. Mo. Ann. Stat. § 375.1188.1 (Vernon 1991 and Supp. 1997). As one court has noted:

> [A]rbitrators . . . are not trained in matters of statutory interpretation and enforcement of contracts under an insurance liquidation scheme where the interests of all affected parties must be considered and protected.
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> * * *
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> Arbitrators are private individuals selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the Superintendent [as liquidator], subject to judicial oversight acting in the public interest.

Ardra, 566 N.Y.S.2d at 579. These are genuine concerns. The arbitration clause Lloyd's seeks to enforce provides that the arbitrators "are relieved from all judicial formality and may abstain from following the strict rules of law." (Resp. App. I5.)

Transit's receiver has been instructed by the state court and by the Missouri insolvency statutes to take possession of and marshal the assets of Transit. These assets have been,[19] and will be used, to pay the claims of Transit's approximately

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[18] Mo. Ann. Stat. § 375.1155.1(3) (Vernon 1991 and Supp. 1997).

[19] The state court has ordered three partial distributions of assets to date, designating over $600 million to pay covered claims.

200,000 claimants. The most significant asset of an insolvent insurance company, such as Transit, is the reinsurance receivables due it. To date, Transit has marshaled over $900 million in assets, mostly in the form of monies paid to it by reinsurers for allowed claims. Policyholders and third-party claimants have a compelling interest in the Receiver's success in marshalling the assets of the estate. Missouri's anti-arbitration statute, and other provisions of the insurance insolvency code, protect policyholders and claimants by providing that disputes will be heard before a more efficient, equitable and consistent tribunal – the state court. The state court's contempt powers and Missouri's anti-arbitration statute assure that the Missouri insurance liquidation scheme, as a whole, will be comprehensively and consistently effectuated by judicial proceedings before a court that is knowledgeable.

Transit seeks to avoid a multiplicity of proceedings potentially yielding fragmented, if not contradictory, interpretations of Missouri's new insurance insolvency statutes. These goals are expressly recognized in Mo. Ann. Stat. § 375.1155 (Vernon 1991 and Supp. 1997). Moreover, one goal of Missouri's anti-arbitration statutes is to centralize litigation in the state court. This, in turn, is intended to minimize administrative expenses and thus provide the greatest asset distribution to, and protection of, policyholders and claimants.[20]

Finally, precluding arbitration in the liquidation context is not some random deviation from the norms of international commerce. Nor can it be viewed as a surprise attack on the reasonable expectations of commercial parties.[21] The advent

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[20] The state court has permitted Transit to arbitrate and litigate outside its court when it was believed to be expedient or necessary for jurisdictional reasons. These actions have in fact been fragmented. These arbitrations also took over two years to complete, and then only after court actions were filed to challenge or enforce the award.

[21] Art. XIX (Insolvency) of the reinsurance agreements expressly puts Lloyd's on notice of some of the consequences of Transit's insolvency. (Resp. App. I3.) While the arbitration clause at issue states that it survives

of an insolvency always introduces new interests to the formerly private commercial arrangements of the debtor and commonly requires the centralization of claims and asset collection in the insolvency court. This is an internationally recognized fact of life.

The Arbitration Agreement is Null and Void

Convention Article II(3) also provides that the court will refer the matter to arbitration "unless . . . said agreement is null and void, inoperative or incapable of being performed." (D1.) This exception is determined by examining the domestic law of the acceding nation. *Ardra*, 567 N.Y.S.2d at 578. *See also* Quigley at 1064.

In this case, Missouri law would apply. Thus, Missouri anti-arbitration statutes make the arbitration provisions of the parties' agreements inoperative. *See Ardra*, 566 N.Y.S.2d at 578-579 (citing Convention, Art. II(1) and II(3) as basis for not enforcing the Convention in an insurance insolvency; the arbitration agreement was incapable of being performed). *See also, Rhone Mediterranee Compagnia Francese di Assucurazion e Riassicurazioni v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983) (exception applies if arbitration clause "contravenes fundamental policies of the forum state.") The courts must allow state law to operate even if it contravenes the Convention. The Convention specifically contemplates that result.

III

No Split in the Circuits Exists

Lloyd's cites seven cases as evidence that the "Court of Appeals have taken widely varying and sometimes inconsistent approaches to determining whether a substantive ruling upon which a remand order is predicated is reviewable on

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the "termination" of the Agreements, it does not say that it survives Transit's insolvency. (Resp. App. I5.)

appeal." (Pet. Br. 14.) Lloyd's asserts that "it is difficult to classify the many opinions." (*Id.* at 13) However, as Transit notes above, the effort to do so reveals that no split in the circuits exists.

The first case cited by Lloyd's, *In re TMI*, is discussed *supra* at 11. Transit has not found another circuit applying the constitutional issue exception established by the Third Circuit in that case. Nor does the case at bar involve constitutional issues. Moreover, in 1992, this Court denied a petition for writ of certiorari to review the decision in *In re TMI. See Gumby v. Gen. Pub. Util. Corp.*, 503 U.S. 96, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992). Thus, while it may represent an "extreme," and perhaps a liberal formulation of when a remand order is reviewable (Pet. Br. 13.), no other circuit court has adopted it and this Court has expressed a willingness to let it stand.

The next case cited by Lloyd's is *Anusbigian v. Trugreen/ Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996). In that case, the district court concluded that the required amount in controversy did not exist to permit diversity removal. In doing so, the district court construed Michigan law governing the payment of commissions. The court remanded the case for lack of subject matter jurisdiction. The Sixth Circuit held that § 1447(d) barred review. Lloyd's apparently considers this case the most restrictive approach used by the circuits. (Pet. Br. 14.) However, this case simply applies and restates well-settled rules governing appellate review of remand orders based on the lack of subject matter jurisdiction. Appellate review is not available even if the remand is clearly erroneous. *Gravitt v. Southwestern Bell Tele. Co.*, 430 U.S. 723, 723, 97 S.Ct. 1439, 1440, 52 L.Ed.2d 1 (1977); *Volvo of America Corp. v. Schwarzer,* 429 U.S. 1331, 1332-1333, 97 S.Ct. 284, 285, 50 L.Ed.2d 273 (1976); *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589, 46 L.Ed.2d at 549.

The next three cases cited by Lloyd's involve review of separate orders allowing joinder of parties. In two cases, the joinder destroyed diversity jurisdiction. *Powers v. Southland*

Corp., 4 F.3d 223 (3d Cir. 1993); *Washington Suburban Sanitary Comm'n v. CRS Sirrine, Inc.*, 917 F.2d 834 (4th Cir. 1990). In the third case, it had no effect on diversity and the court remanded on other grounds. *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023 (5th Cir. 1991).

In *Washington*, the Fourth Circuit framed the issue as follows: "Is appellate review of a remand pursuant to 28 U.S.C. § 1447(e) barred by § 1447(d)?" The Fourth Circuit held that review was barred. The court found that the *Thermtron* exception did not apply because the remand was provided by statute. 917 F.2d at 835. *See also, In the Matter of Florida Wire & Cable Co.*, 102 F.3d 866 (7th Cir. 1996) (§ 1447(d) bar extends to all statutorily authorized remands, even those under § 1447(e), citing recent decision in *Quackenbush v. Allstate Ins. Co.*, ___ U.S. ___, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996)).

In *Powers*, the district court permitted a relation-back amendment under Fed. R. Civ. P. 15(c) to add a party despite statute of limitations problems. The amendment destroyed diversity and the district court remanded. The defendants appealed the order permitting the amendment, but not the remand order itself. 4 F.3d at 224. The defendants conceded and the Third Circuit found that the remand order was not reviewable. *Id.* at 224, 226. However, the separate order permitting amendment was reviewable under the teachings of *Waco* and circuit court decisions relating to substituted parties who destroyed diversity jurisdiction. *Id.* at 226-227. The court nonetheless dismissed the appeal because the appealed order failed to satisfy the three-prong test of the "collateral order" doctrine. *Id.* at 231, citing *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271, 276, 108 S.Ct. 1133, 1136-37, 99 L.Ed.2d 296 (1988). It was not a final decision within the meaning of 28 U.S.C. § 1291. Only one other circuit has cited this case and then only for the definition of a "collateral order." *Board of Educ. of Oak Park & River Forest High School Dist. 200 v. Ill. State Bd. of Educ.*, 79 F.3d 654,

657 (7th Cir. 1996). Further, the citing case did not involve remand, but original federal question jurisdiction. *Id.*

Tillman involved joinder of the Louisiana Department of Transportation and Development. The joinder did not destroy diversity, but it did raise issues of immunity.[22] The district court erroneously remanded (diversity jurisdiction still existed) because it believed that no private citizen could sue the Department. Although the district court did not mention § 1447(c) or that remand was based on lack of subject matter jurisdiction, the appellate court nonetheless held that § 1447(d) barred review. The court next stated: "Whatever the outcome of the chicken or egg riddle of which came first, the allowance of the amendment [to join a party] or the remand order, our conclusion essentially renders review of [the separate order] a postmortem exercise." 929 F.2d at 1028. Under a section of the opinion entitled "Extra Postage" the court also found that it lacked appellate jurisdiction to review the order granting leave to amend because it was an unreviewable interlocutory order. While one might question the court's application of the "collateral order" doctrine, this Court nonetheless denied a petition for writ of certiorari filed in 1991. *See CSX Transp., Inc. v. Tillman*, 502 U.S. 859, 112 S.Ct. 176, 116 L.Ed.2d 139 (1991).

Taken together, these cases again teach that remand orders are not reviewabie. Only three circuits have spoken on the issue of whether an appellate court may review a separate order permitting joinder that destroys diversity. One has permitted review (Third Circuit in *Powers*). The other two circuits did not even consider the issue (Fourth Circuit in *Washington*; Seventh Circuit in *Florida Wire*). These decisions are all fairly recent. Thus, it is premature to conclude that a split in the circuits exists.

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[22] Since the ruling did not destroy diversity, but instead dealt with another issue, *Tillman* is like the cases cited *supra* at n.7 and accompanying text. It is consistent with the approach taken by those circuits.

While these cases raise interesting review issues, they have no application here when remand did not involve diversity or immunity and it was expressly made pursuant to § 1447(c). Moreover, the district court did not issue a separate order joining parties or permitting a relation-back amendment.

The last two cases cited by Lloyd's as evidence of a conflict in the circuits are *Gonzales-Garcia v. Williamson Dickie Manuf. Co.*, 99 F.3d 490 (1st Cir. 1996) and *Tingley v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992) (before Judges Goodwin, Sneed and Taylor). Both cases involved ERISA preemption. As noted above, the majority of circuits, including the First and the Ninth Circuits, have found that remands based on lack of complete preemption are not reviewable on appeal. *See supra* at 12-14. The decision in *Tingley* appears to be one of the exceptions. However, the decision contradicts two earlier decisions of the Ninth Circuit decided by different panels. *See Whitman*, 886 F.2d at 1181 (before Judges Hug, Brunetti, and Noonan) and *Hansen*, 891 F.2d at 1388 (before Judges Nelson, Boochever, and Browning). Moreover, the circuit panel in *Tingley* did not cite this earlier law or any of the precedent of this Court governing review of remand orders. 953 F.2d at 1129. The circuit court in fact made no effort to establish the basis for its exercise of appellate jurisdiction. It never stated why § 1447(d) did not apply. Accordingly, it is not unreasonable to assume that this split will resolve itself over time.

This Case Involves a Very Narrow Issue not Likely to Recur

This case involves the interplay between a state statute, Mo. Ann. Stat. § 435.350 (Vernon 1991) and the Convention and the Convention's implementing legislation. However, since the time the district court entered its order, the Missouri

legislature amended § 435.350.[23] The statute now permits arbitration of reinsurance agreements. Thus, Lloyd's requests this Court to review a ruling which will have application in only a few cases, if any.

A decision by this Court would have very limited application for another reason, as well. Only seven other states – Kansas, Kentucky, Montana, Oklahoma, South Carolina, South Dakota and Vermont – have adopted the Uniform Arbitration Act and have excluded insurance agreements from its scope. Kan. Stat. Ann. § 5-401 (1991); Ky. Rev. Stat. Ann. § 471.050 (Michie/Bobbs-Merrill Supp. 1996); Mont. Code Ann. § 27-5-114 (1995); Okla. Stat. tit. 15, § 802 (West 1993); S.C. Code Ann. § 15-48-10 (Law Co-op. Supp. 1996); S.D. Codified Laws Ann. § 21-25A-3 (1987); Vt. Stat. Ann. tit. 12, § 5653(a) (Supp. 1997). However, three of those states – Kentucky, Montana, and Oklahoma – permit arbitration between insurers, including reinsurers.[24] Thus, it is highly unlikely that an identical case will arise from either Missouri or any of these seven states.

In addition, the legislation implementing the Convention, 9 U.S.C. §§ 201 to 208, was passed in 1970, almost thirty years ago.[25] In all that time, the Court has considered only

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[23] The statute now provides: "[R]einsurance contracts are not 'contracts of insurance or contracts of adhesion' for purposes of the arbitration provisions of this section." Mo. Ann. Stat. § 435.350 (Supp. 1997). Accordingly, the statute no longer precludes arbitration between an insurer and its reinsurer.

[24] Another ten states preclude arbitration of auto liability or uninsured motorist claims, or claims against a motor vehicle policy holder, Ark. Stat. Ann. § 23-79-203 (1987); Ga. Code Ann. § 33-7-11(g) (Supp. 1997); La. Rev. Stat. Ann. § 22:1406(d)(5) (1995); Me. Rev. Stat. Ann. tit. 14, § 5948 (1980); Md. Ann. Code art. 48A § 19-509(j) (1996); Miss. Code Ann. § 83-11-109 (1973); Nev. Rev. Stat. § 690B.017 (1995); Tenn. Code Ann. § 56-7-1206(c) (1994); Va. Code. Ann. § 38.2-2206H; W. Va. Code § 33-6-31(g) (1996). It is unlikely, however, that auto liability or uninsured motorist claims will implicate the international Convention.

[25] S. 3274, Pub. L. 91-368, 91st Cong., 2d Sess. (1970).

one case in which state insurance law prohibited application of the Convention. *Ardra,* 567 N.Y.S.2d at 578. In that case, this Court denied certiorari. *See Ardra Ins. Co., Ltd. v. Curiale,* 500 U.S. 953, 111 S.Ct. 2260, 114 L.Ed. 712 (1991).

In summary, even if this Court finds the remand issue generally worthy of consideration, other cases involving insurers or the Convention present better vehicles for resolving the issue. If this case is truly "certworthy," the issue framed by Lloyd's will invariably recur in a context having much broader application than the case at bar.

Antecedent State Law is Unclear

As noted above, Missouri has a second statute, Mo. Ann. Stat. § 375.1188.1 (Vernon 1991), governing arbitration in insurance insolvency. Following remand, Lloyd's finally filed a motion to compel arbitration. The state court denied the motion, finding that section 375.1188.1 precluded arbitration in actions involving an insurance liquidator. That ruling is currently on appeal in the Missouri Court of Appeals. (Resp. App. G5-G6.) Thus, it is still unclear whether a Missouri appellate court will agree that the state arbitration statutes preclude arbitration under the Convention. This Court should permit the state appellate courts to interpret state law before the Court reaches the issue raised by Lloyd's in the case at bar. If the state court finds that arbitration may proceed, that ruling would be binding on any federal court ruling on a motion to remand in similar circumstances.

CONCLUSION

The rationale for refusing to review remand orders based on the lack of subject matter jurisdiction is to prevent delay of justice in state courts. *Thermtron,* 423 U.S. at 351, 96 S.Ct. at 593. Transit filed its suit against Lloyd's in 1995. Two years later, the parties are still fighting over the proper forum to resolve the dispute. Transit finds this fight even more difficult to endure given that the contractual breach at issue is not

governed by the arbitration clause, but instead is governed by the clause permitting Transit to bring suit against Lloyd's for a "failure to pay claims." Finally, the district court would have remanded the case in any event for the reason that Lloyd's contractually waived its right to remove.

This case presents a distinctly different issue than that suggested by the cases cited by Lloyd's. Appellate review is not available when the sole basis for remand is lack of subject matter jurisdiction. Lloyd's seeks to avoid this result by reciting the language of *Pelleport* and its progeny. By denying Lloyd's Petition for Writ of Certiorari, the parties can resolve their dispute in the Missouri state courts, which are equally prepared to consider the scope of Lloyd's arbitration rights.

Respectfully submitted,

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Transit Casualty Company in
Receivership.

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APPENDIX A

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

MARY C. HALL, Acting Director Division of Insurance Department of Economic Development State of Missouri, Plaintiff, v. TRANSIT CASUALTY COMPANY 130 South Bemiston, Suite 101 St. Louis, Missouri 63105, Defendant.	Cause No. CV185-1206CC Division II

AMENDED ORDER OF LIQUIDATION AND APPOINTMENT OF PERMANENT RECEIVER

Now on this 3rd day of December, 1983 the Petition for Liquidation filed by Mary C. Hall, Acting Director of the Division of Insurance, Department of Economic Development, State of Missouri, coming on for hearing and the defendant company by its president and member of the board of directors, Gerald Steven DeGennaro having entered a general appearance in behalf of defendant corporation, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Transit Casualty Company is hereby declared to be insolvent;

2. Mary C. Hall, Acting Director of the Division of Insurance, Department of Economic Development, State

of Missouri, is appointed permanent receiver with all powers and duties attendant thereof until further order of the Court;

3. John C. Cozad is hereby appointed Special Deputy Receiver;

4. The receiver is ordered to take possession of, with authority to transfer and control, the property, business books, records, and accounts of the company, and possession and control of the premises occupied by defendant for the transaction;

5. The officers, directors, agents, employees of defendant Transit Casualty Company are and continue to be permanently enjoined and restrained from selling, assigning or disposing of the business or of any of the assets of said Transit Casualty Company;

6. All of the creditors and claimants of defendant Transit Casualty Company, wherever situated, be and are hereby restrained and enjoined from levying any execution, garnishment or attachment on the property and assets of said Transit Casualty Company;

7. All persons, wherever situated are permanently enjoined and restrained from prosecuting or bringing any action, issuing any process or obtaining any judgment against defendant Transit Casualty Company or its properties or assets;

8. All persons, wherever situated, are hereby enjoined from interference with the possession, title or rights of petitioner as Receiver in Liquidation in and to the assets of defendant Transit Casualty Company and from interference with the conduct of liquidation of

defendant Transit Casualty Company except as may be ordered by the Court;

9. All policies of insurance issued by defendant Transit Casualty Company cancelled effective at midnight on December 20, 1985;

10. The receiver is authorized to hire, retain, terminate employees as needed to effectuate the winding up and liquidation of the defendant company and to negotiate the terms of such employment relations;

11. The receiver is authorized to contract with independent contractors, including but not limited to attorneys, to perform services as needed to effectuate the winding up and liquidation of the defendant company;

12. The receiver is authorized to transfer, invest, reinvest and otherwise deal in the assets and property, real or personal, of the company so as to effectuate the winding up and liquidation of the defendant company;

13. The receiver is authorized to file suit, make claims, arbitrate, settle or take other legal action in pursuit of the interests of the receivership;

14. The receiver is authorized to do all things necessary to effectuate the winding up and liquidation of the defendant company;

15. All costs of this proceeding shall be taxed against defendant Transit Casualty Company.

/s/ Byron L. Kinder
BYRON L. KINDER, Judge
Circuit Court of
Cole County, MO
Division II

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

I, LINDA L. ROARK, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of Amended Order of Liquidation & Appointment of Permanent Receiver as fully as the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and and affixed this seal of my said office this 3rd day of May 1989.

LINDA L. ROARK, Clerk

_____ By /s/ Jackie Blackwell
Deputy Clerk

Circuit Court of Cole County, Missouri

APPENDIX B

JUDGES DOCKET SHEET

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

Division:II BOOK :D1 PAGE :630
Case No. :CV595-0002CC

Trial judge : HON BYRON L. KINDER

TRANSIT CASUALTY COMPANY

VS

LLOYD'S OF LONDON, THE CORP. AT LLOYD'S

NATURE OF ACTION :OTHER EXTRAORDINARY REMEDY

Disp: FILED :12/22/95 Last Action :12/01/97

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12/21/95	Petition and Motion for Order to Show Cause, filed, sm
12/22/95	Show Cause Order and Decree entered.
01/04/96	Summons issued by the Clerk directed to McCarthy Leonard for service on defendants.
01/04/96	Show Cause Order issued by the Clerk and directed to McCarthy, Leonard for service on defendants. sm
01/19/96	Motion of Lloyd's of London Underwriting Syndicate No. 553 and CJW Underwriting Agency, LTD'ss for more Definite Statement and Suggestions in Support Thereof, filed. sm

01/24/96	Summons issued by the Clerk and directed to McCarthy, Leonard, etc. for service on defendants. sm
01/24/96	Show Cause Order issued by the Clerk and directed to McCarthy, Leonard, etc. for service on defendants. sm
01/24/96	Motion of Lloyd's of London Underwriting Syndicate No. 553 and CJW Underwriting Agency, LTD, to Strike Certain Allegations of Plaintiff's Petition and Motion for Order to Show Cause and Suggestions in Support Thereof, filed. sm
01/24/96	Motion for Admission of Pro Hac Vice of Lord Bissel & Brook, filed. sm
01/25/96	Entry of Appearance of Donald C. Otto, Jr. for defendants Lloyd's of London Underwriting Syndicate No. 553 and CJW Underwriting Agency, Ltd., filed. sm
01/30/96	Terri Thompson returned summons as counsel for defendant has entered his appearance. No summons is to be issued. sm
02/02/96	Entry of Appearance of Paula M. Young on behalf of Transit Casualty Company, filed. sm
02/02/96	Transit's Suggestions in Opposition to Motion to Strike and Notice of Hearing, filed. sm
02/05/96	Transit's Suggestions in Opposition to Motion for More Definite Statement, filed. sm
02/09/96	Entry of Appearance of Robert A. Henderson on behalf of certain Underwriters at

	Lloyd's London, subscribers to contracts of reinsurance with Transit Casualty Company, sued herein as Lloyd's Syndicate No. 553, and CJW Underwriting Agency, Ltd., filed. sm
02/20/96	Memorandum to the Court to File First Amended Petition and Motion For Order to Show Cause, filed.
02/21/96	Order entered to file First Amended Petition. (c/Order)
02/21/96	Plaintiff's First Amended Petition and Motion for Order to Show Cause, filed. sm
02/29/96	Summons issued by the Clerk directed to the Attorney for Petitioner for Sevice [sic] on Respondents. sm
03/04/96	Return on Affidavit of Service, filed. sm
03/07/96	Show Cause Order and Decree issued by the Clerk and return to counsel for plaintiff for service. sm
03/28/96	Return on Service of Summons by Attorney for Plaintiff for Special Process Server. sm
04/03/96	Amended Affidavit of Service by Special Process Server, filed. sm
04/11/96	Defendants' Motion of Certain Lloyd's Underwriters to Dismiss First Amended Petition and Motion for Order to Show Cause and Suggestions in Support Thereof, filed. sm
04/15/96	Plaintiff's Motion to Amend by Interlineation, filed. sm

04/15/96	Plaintiff's Dismissal Without Prejudice, filed. sm
04/15/96	Motion of Certain Lloyd's Underwriters to Dismiss First Amended Petition and Motion for Order to Show Cause and Suggestions in Support Thereof, filed. sm
04/29/96	Plaintiff's Notice of Hearing, filed. sm
05/06/96	Copy of Notice of Removal as filed in the United States District Court for the Western District of Missouri Central Division W.D. # 96 4173-CV-C-2). sm
05/06/96	Notice to Plaintiff of Removal as filed in the U.S. District Court W.D. Central Division (Case # 96 4173-CV-C-2). sm
05/06/96	Notice to State Court of Removal, filed. sm
05/15/96	Defendant's Motion for Show Cause Order, filed. sm
05/15/96	Defendant's Request for Appointment of Process Server, filed. sm
05/15/96	Show Cause Order and Decree issued by the clerk and directed to Special Process Server for service on Lloyd's of London.
05/22/96	Plaintiff's Memorandum to the Court, filed. sm
05/22/96	Per Memorandum filed, case continued to July 29, 1996, at 4:00 P.M. (Copy of Docket Sheet to Attys. Owen and Henderson)
05/23/96	Return on Service by Special Process Server, filed. sm
06/11/96	Case remanded to Circuit Court by Missouri Court of Appeal Western District Central Division, filed. sm

06/12/96	Plaintiff's Motion for Leave to File Second Amended Petition (with Amended Petition attached), filed, and Notice of Hearing (6/18/96).
06/18/96	Telephone Hearing; Leave granted to file amended petition unless preempted by 8th Circuit; Defendant given 30 days to file pleadings. (c/Form 1)
06/18/96	Second Amended Petition and Motion for Order to Show Cause, filed. sm
07/15/96	Plaintiff's Notice of Deposition, filed. sm
07/15/96	Plaintiff's Certificate of Service, filed. sm
07/16/96	Plaintiff's Request for Appointment of Process Server of Tom Benno, filed. sm
07/16/96	Order Appointing Tome Benno entered. (c/Order)
07/16/96	Plaintiff's Request for Appointment of Process Server of Nick Ivanov, filed. sm
07/16/96	Order appointing Nick Ivanov entered. (c/Order)
07/17/96	Motion to Enforce Pre-Answer Security Requirement and Notice of Hearing 7-25-96), filed. sm
07/16/96	Plaintiff's Notice to Take Deposition, filed. sm
07/17/96	Plaintiff's Memorandum of Filing, filed. sm
07/17/96	Defendants' Motion to Quash Notice for Deposition of C.J. Warrilow and Motion for Protective Order and Memorandum of Law in Support Thereof, filed. sm

07/17/96	Plaintiff's Amended Request for Appointment of Process Server of Nick Ivanov, filed. sm
07/17/96	Amended Order appointing Nick Ivanov entered. (c/Order)
07/18/96	Motion of Certain Lloyd's Underwriters to Compel Arbitration and to Dismiss or Stay Second Amended Petition and Motion for Order to Show Cause or, in the Alternative, to Dismiss the Petition and Order and Suggestions in Support, filed. sm
07/18/96	Teleconference Hearing Held on July 18, 1996, Before the Honorable Byron L. Kinder, filed. sm
07/19/96	Order that Defendants' Motion to Dismiss and to Compel Arbitration called, heard and denied. (C/Order)
07/22/96	Teleconference Hearing Held on July 19, 1996, Before the Honorable Byron L. Kinder, filed. sm
07/24/96	Certain Lloyd's Underwriters' Response to Receiver's Motion to Require Pre-Answer Security, filed. sm
07/24/96	Certain Lloyd's Underwriters' Response to Receiver's Motion for Order to Show Cause, filed. sm
07/25/96	The following matters presented. Motion to enforce security. Motion for Contempt. Defendant's Motion to Dismiss. Plaintiff presents evidence, case continued to September 16, 1996.
07/25/96	Plaintiff's Motion to Amend by Interlineation, filed. sm

07/25/96	Motion of Transit Casualty Company for Court To Take Judicial Notice of Certain Documents, filed. sm
07/25/96	Transit's Pre-Hearing Brief on the Lloyd's American Trust Fund, filed. sm
08/02/96	Plaintiff's Notice of Trial on Certain Counts, filed. sm
08/05/96	Plaintiff's Certificate of Service, filed. sm
08/16/96	Plaintiff's Notice to Take Deposition, filed. sm
08/16/96	Plaintiff's Notice of Deposition, filed. sm
08/19/96	Defendants' Rule 74.06 Motion to Correct Certain Portions of the Court's Order of July 19, 1996, filed. sm
08/23/96	Transit's Motion to Compel Answers to Plaintiff's First Interrogatories and For Sanctions and Notice of Hearing, filed. sm
08/23/96	Affidavit of James C. Owen in Support of Transit's Motion to Compel and for Sanctions, filed. sm
08/23/96	Transit's Memorandum of filing, filed. sm
08/28/96	Notice of Appeal to the Missouri Court of Appeals, Western District, filed. sm (Cost pd direct by appellant's attorney)
08/30/96	Plaintiff's Amended Notice of Hearing, filed. sm
09/03/96	Plaintiff's Memorandum of Filing, filed. sm
09/03/96	Affidavit of Service of Nikolai Ivanov, filed. sm

09/03/96 Defendants' Motion to Quash Notice for Deposition of Designees of Syndicate 553 and Motion for Protective Order, filed. sm

09/03/96 Defendants' Motion to Quash Notice for Deposition of Kurt Meyer and Motion for Protective Order and Notice, filed. (9/3/96). sm

09/03/96 Certain Lloyd's Underwriters' Response to and Suggestions in Opposition to Plaintiff's Motion to Compel, filed. sm

09/03/96 Defendants' Motion to Shorten Time in Which to Provide Notice, filed. sm

09/03/96 Certain Underwriters at Lloyd's of London's Supplemental Response to Receiver's Motion for Order to Show Cause and Motion to Vacate Show Cause Order Entered on July 12, 1996 and Counter Motion to Compel Arbitration, filed. sm

09/03/96 Certain Lloyd's Underwriters' Motion to Strike Plaintiff's Notice of Trial on Certain Counts and Motion to Consolidate Actions Between Same Parties Involving Common Issues of Law and Fact, filed. sm

09/04/96 Lloyd's Motion to Correct this Court's July 13, 1996 Order called, heard and sustained, as follows: The following words should be added to correctly express this Court's Order, as it should have been transcribed: (1) After the word "Dismiss" on the first line, add "on the issue of whether these matters must be arbitrated" and (2) At the end of the Order, add "This Order applies to the Show Cause Order issued July 12,

1996 as well as the Second Amended Petition. The parties will consult with their clients on the Court's proposal for settlement of the matters set for hearing on September 16 and 17 and report to the Court by 4:00 p.m. CST on September 10, 1996. All matters on the July 12, 1996 Show Cause Order will be jointly heard and ruled upon here and after with the matters pleaded in the Second Amended Petition. Lloyd's Motion to consolidate so resolved. All other motions set for hearing today and further matters will be referred to Special Master James Dalton. The parties will submit a proposed order of reference to the Court for this purpose by September 4, 1996. (c/Form 1)

09/06/96 Copy of letter from Clerk, Missouri Court of Appeals, Western District, acknowledging receipt of Notice of Appeal, filed (WD #53230).

09/12/96 Plaintiff's Memorandum of Filing of Certain Lloyd's Underwriters' Responses to Plaintiff's Second Set of Interrogatories Directed to Defendants and Appendix to Certain Lloyd's Underwriters' Responses to Plaintiff's Second Set of Interrogatories Directed to Defendants, filed. sm

09/13/96 Teleconference Hearing Held on September 3, 1996, Before the Honorable Byron L. Kinder, filed. sm

09/13/96 Teleconference Hearing Held on September 11, 1196, [illegible] Before the Honorable Byron L. Kinder, filed. sm

09/13/96	Order of Reference to Special Master entered. (c/Order) (c/Oath)
09/13/96	Order for Security entered. (c/Order)
09/26/96	Defendants' Motion for Enlargement of Time, filed. sm
09/27/96	Ordered that defendants have until October 4, 1996 to file an answer in this case entered. (c/Order)
10/04/96	Defendants' Answer to the Second Amended Petition and Motion for Order to Show Cause, filed. sm
11/08/96	Motion of Certain Lloyd's Underwriters for Partial Judgment on the Pleadings Pursuant to Rule 55.27(b) and Suggestions in Support Thereof, filed. sm
11/22/96	Transit's Motion to Compel Answers to Plaintiff's Second Set of Interrogatories and For Sanctions, filed. sm
11/22/96	Plaintiff's Notice of Hearing, filed. (12/5/96) at 1:00 p.m. for Motion to Compel Answers to Plaintiff's First and Second Set of Interrogatories and Sanctions.
12/02/96	Plaintiff Transit's Suggestions in Opposition to Defendants Lloyd's Motion for Judgment on the Pleadings, filed. sm
12/03/96	Plaintiff's Amended Notice of Hearing (12-10-96 at 1:00 p.m.), filed. sm
12/06/96	Defendants' Suggestions in Opposition to Transit Motion to Compel Answers to Its Second Set of Interrogatories and Appendix, filed. sm

12/06/96	Defendants Reply Suggestions in Support of Motion of Certain Lloyd's Underwriters for Partial Judgment on the Pleadings Pursuant to Rule 55.27(b) and Appendix Vol. I, II, and III, filed. sm
12/10/96	Transit's Suggestions in Support of Its Motion to Compel Answers to Its First and Second Set of Interrogatories and For Sanctions, filed. sm
12/17/96	Transit Suggestions in Support of its Motion to Compel Answers to its First and Second Set of Interrogatories and for Sanctions, filed. sm
12/30/96	Hearing held on December 10, 1996, before Special Master James P. Dalton, filed. sm
12/31/96	Order that parties shall appear for oral argument on the pending discovery motions filed by Transit as soon as is practicable, no later than January 22, 1997. (c/Order).
01/10/97	Order granting Transit's Motion for Additional Time to Respond to Defendant's Request for Production of Documents entered. (c/Order)
01/10/97	Order granting Transit's Motion for Additional Time to Respond to Defendant's Interrogatories entered. (c/Order)
01/14/97	Plaintiff's Request for additional Time, filed. sm
01/14/97	Plaintiff's Request for Additional time, filed. sm
01/21/97	Certain Lloyd's Underwriter's Motion to Vacate Order of January 10, 1997 and

	Responses to (1) Transit's "Request" for Additional Time To Answer or Object to Defendants' Interrogatories and (2) Transit's Suggestions in Support of Its Motion to Compel Answers to Interrogatories, filed. sm
02/10/97	Transit's Supplemental Suggestions in Support of Its Motion to Compel Answers to its First and Second Set of Interrogatories and for Sanctions, filed. sm
02/24/97	Joint Motion for a Stay of Proceedings, filed. sm
04/01/97	Compex Litigation Form Filed.
05/14/97	Certain Lloyd's Underwriters' Response to Transit's Supplemental Suggestions in Support of its Motion to Compel Answers to its First and Second Set of Interrogatories and for Sanctions and Appendix To, filed. sm
05/27/97	Order on Discovery entered. (c/Order)
06/11/97	Certain Lloyd's Underwriters' Motion for Extension of Time in Which to File Supplemental Responses to Plaintiff's First and Second Sets of Interrogatories Directed to Defendants, filed. sm
06/16/97	Order entered. (c/Order)
06/18/97	Transit's Objections to Lloyd's Request for Additional Time, filed. sm
07/07/97	Suggestions in Opposition to Defendants Lloyd's Petition for Writ of Prohibition, filed. sm
07/08/97	Defendants' Certificate of Service, filed. sm
07/21/97	Plaintiff's Filing Memorandum, filed.

07/21/97	Transit's Answers and Objections to Certain Lloyd's Underwriters' First Set of Interrogatories to Transit Casualty Company in Receivership, filed. sm
07/21/97	Transit's Responses and Objections to Certain Lloyd's Underwriters' Request for Production of Documents by Transit Casualty Company in Receivership, filed. sm
09/05/97	Notice to Take Deposition, filed. sm
10/28/97	Plaintiff's Memorandum of Filing, filed. sm
10/28/97	Transit Casualty Company's Motion for Protective Order, filed. sm
10/28/97	Plaintiff's Certificate of Service of Interrogatories, filed. sm
10/28/97	Defendant's Certificate of Service, filed. sm
11/25/97	Plaintiff's Filing Memorandum, filed. sm
11/25/97	Transit Casualty Company's Motion for Protective Order Relating to Lloyd's Second Set of Interrogatories and Second Request for Production of Documents, filed. sm
11/25/97	Plaintiff's Certificate of Service, filed. sm
11/25/97	Plaintiff's Notice of Hearing, filed. (12/4/97 at 1:00 p.m.)
12/01/97	Certain Lloyd's Underwriter's Response to Plaintiff's Third Interrogatories Directed to Defendants, filed. sm
12/01/97	Transit's Amended Notice of Hearing, filed. sm
12/01/97	Transit's Certificate of Service, filed. sm

APPENDIX C

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI IN RE TRANSIT CASUALTY COMPANY IN RECEIVERSHIP CAUSE NO. CV185-1206CC

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff,	)	Case No. CV595-2CC
v.	)	
LLOYD'S OF LONDON, THE CORPORATION AT LLOYD'S, LLOYD'S OF LONDON UNDERWRITING SYNDICATE NO. 553 and CJW UNDERWRITING AGENCY, LTD., Defendants.	)	

SHOW CAUSE ORDER AND DECREE

Now this 22nd day of December, 1995, comes Plaintiff in the above entitled cause, being the duly appointed, qualified and acting Special Deputy Receiver of Transit Casualty Company ("Transit") pursuant to the provisions of Chapter 375, RSMo, and the orders of this Court, by his attorney, and presents to the Court the Petition and Motion for Order to Show Cause of the Plaintiff, and the Court, having read and considered same, having heard counsel and being fully advised in the premises, finding that the Court has jurisdiction and further finding that it appears that the Plaintiff is entitled to the relief prayed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants be and appear before the Circuit Court of Cole County, Missouri, Division II, thirty (30) days after service of Summons and show cause why they should not be adjudged and held in contempt of this Court by reason of their failure to pay reinsurance recoveries and their interference with the liquidation of Transit Casualty Company and why judgment should not be entered against them as prayed in Transit Casualty's Petition and Motion for Order to Show Cause.

/s/ Byron L. Kinder
Byron L. Kinder, Judge
Circuit Court of Cole County,
Missouri, Division II

APPENDIX D

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI IN RE TRANSIT CASUALTY COMPANY IN RECEIVERSHIP CAUSE NO. CV185-1206CC

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff, vs. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON WHO ARE SUBSCRIBERS TO CONTRACTS 8OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, and C.J. WARRILOW, AN UNDERWRITER AT LLOYD'S OF LONDON, INDIVIDUALLY, AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, Defendants.	Case No. CV595-2CC Transit Docket

SHOW CAUSE ORDER AND DECREE

Now this 7 day of March, 1996, comes Plaintiff in the above entitled cause, being the duly appointed, qualified and acting Special Deputy Receiver of Transit Casualty Company ("Transit") pursuant to the provisions of Chapter 375, RSMo, and the orders of this Court, by his attorney, and presents to the Court the First Amended Petition and Motion for Order to Show Cause of the Plaintiff, and the Court, having read and considered same, having heard counsel and being fully advised in the promises, finding that the Court has jurisdiction and further finding that it appears that the Plaintiff is entitled to the relief prayed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants be and appear before the Circuit Court of Cole County, Missouri, Division II, on May 20, 1996 at 9:30 a.m. to show cause why they should not be adjudged and held in contempt of this Court by reason of their failure to pay reinsurance recoveries and their interference with the liquidation of Transit Casualty Company and why judgment should not be entered against them as prayed in Transit Casualty's First Amended Petition and Motion for Order to Show Cause.

3-7-96
Date

/s/ Byron L. Kinder
Byron L. Kinder, Judge
Circuit Court of
Cole County,
Missouri, Division II

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,	)	
Plaintiff,	)	**Civil Action No. 96-4173-CV-C-2**
vs.	)	
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY,	)	
and	)	
C.J. WARRILOW, AN UNDERWRITER AT LLOYD'S OF LONDON, INDIVIDUALLY, AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553,	)	
Defendants.	)	

MOTION OF CERTAIN LLOYDS'S UNDERWRITERS TO DISMISS FIRST AMENDED PETITION AND MOTION FOR ORDER TO SHOW CAUSE

COMES NOW Certain Underwriters at Lloyd's, London, subscribers to contracts of reinsurance with Transit Casualty Company, sued herein as Lloyd's Syndicate No.

553 (hereinafter referred to as "Certain Lloyd's Underwriters"),[1] by and through their undersigned counsel, and hereby move this Court for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This action was originally filed in the Circuit Court of Cole County, Missouri, Case No. CV595-2CC. Certain Lloyd's Underwriters removed this case to this Court on May 5, 1996 pursuant to 9 U.S.C. § 205.

In the state court action, Certain Lloyd's Underwriters had previously moved for dismissal for failure to state a claim pursuant to Rule 55.27(a)(6) of the Supreme Court of Missouri because all of the claims stated in Plaintiff's First Amended Petition and Motion for Order to Show Cause are subject to arbitration under the express terms of the Reinsurance Agreements. A copy of Certain Lloyd's Underwriters' state court Motion to Dismiss and Suggestions in support thereof is attached hereto as Exhibit A.

Certain Lloyd's Underwriters' state court motion was timely filed on April 11, 1996. At the time of the removal of this action, Transit had not responded to the state court

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[1] "Certain Lloyd's Underwriters" are the Lloyd's Underwriters who through their membership in Lloyd's Syndicate 553 subscribed to the contracts identified in ¶ 20 of the First Amended Petition as (1) Quota Share Reinsurance Agreement effective December 1, 1978; (2) Quota Share Reinsurance Agreement No. 7080/1/81 effective June 1, 1981; and (3) First Casualty Quota Share Reinsurance Agreement No. 7080/1/84 effective January 1, 1984 and Interests and Liabilities Contract thereto (hereinafter the "Reinsurance Agreements"). "Certain Lloyd's Underwriters" include defendant C.J. Warrilow.

Motion and the Court had not yet heard or ruled on the Motion.

By and through their Motion herein Certain Lloyd's Underwriters wish to bring the issues raised in their state court Motion to Dismiss before this Court for decision. In support of this Motion, the moving defendants contemporaneously filed a Memorandum of Law to be incorporated fully herein.

WHEREFORE, Defendants Certain Lloyd's Underwriters respectfully request this Court to enter an order dismissing Plaintiff's First Amended Petition and Motion for Order to Show Cause and for such other and further relief as the Court deems just and appropriate including a stay of any actions involving disputes or differences arising out of the Reinsurance Agreements.

SHUGHART THOMSON &
KILROY, P.C.

/s/ Joseph J. Roper
ROBERT A. HENDERSON #28566
JOSEPH J. ROPER #36995
120 West 12th St., Suite 1500
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 Facsimile

and

ROBERT A. KNUTI
JOHN M. WULFERS
SUSAN P. JORDAN
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, IL 60603
(312) 443-0700
(312) 443-0570 Facsimile

ATTORNEYS FOR DEFENDANTS
CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,
SUBSCRIBERS TO CONTRACTS
OF REINSURANCE WITH
TRANSIT CASUALTY
COMPANY, SUED HEREIN AS
LLOYD'S SYNDICATE NO. 553

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion of Certain Lloyd's Underwriters to Dismiss First Amended Petition and Motion for Order to Show Cause was served by U.S. mail, postage prepaid, this 9 day of May, 1996, on:

James C. Owen, Esq.
McCarthy, Leonard, et al.
16141 North Outer Forty Drive, #300
Chesterfield, MO 63017
Attorneys for Receiver for Transit Casualty Company

/s/ Joseph J. Roper
ATTORNEY FOR DEFENDANTS
CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,
SUBSCRIBERS TO CONTRACTS
OF REINSURANCE WITH
TRANSIT CASUALTY
COMPANY, SUED HEREIN AS
LLOYD'S SYNDICATE NO. 553

EXHIBIT A

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI IN RE TRANSIT CASUALTY COMPANY IN RECEIVERSHIP CAUSE NO. CV185-1206CC

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff, vs. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON WHO ARE SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, and C.J. WARRILOW, AN UNDERWRITER AT LLOYD'S OF LONDON, INDIVIDUALLY, AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, Defendants.	Case No. CV595-2CC Transit Docket

MOTION OF CERTAIN LLOYDS'S UNDERWRITERS TO DISMISS FIRST AMENDED PETITION AND MOTION FOR ORDER TO SHOW CAUSE

(Filed April 15, 1996)

COMES NOW Certain Underwriters at Lloyd's, London, subscribers to contracts of reinsurance with Transit Casualty Company, sued herein as Lloyd's Syndicate No. 553 (hereinafter referred to as "Certain Lloyd's Underwriters"),[1] by and through their undersigned counsel, and hereby move this Court pursuant to Rule 55.27(a)6) of the Supreme Court of Missouri to dismiss Plaintiff's First Amended Petition and Motion for Order to Show because the claims stated in that petition are subject to arbitration under the express terms of the reinsurance contracts at issue. In support of this motion, the moving defendants contemporaneously file their suggestions to be incorporated fully herein.

WHEREFORE, Defendants Certain Lloyd's Underwriters respectfully request this Court to enter an order dismissing Plaintiff's First Amended Petition and Motion

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[1] "Certain Lloyd's Underwriters" are the Lloyd's Underwriters who through their membership in Lloyd's Syndicate 553 subscribed to the contracts identified in ¶ 20 of the First Amended Petition as (1) Quota Share Reinsurance Agreement effective December 1, 1978; (2) Quota Share Reinsurance Agreement No. 7080/1/81 effective June 1, 1981; and (3) First Casualty Quota Share Reinsurance Agreement No. 7080/1/84 effective January 1, 1984 and Interests and Liabilities Contract thereto. "Certain Lloyd's Underwriters" include defendant C.J. Warrilow.

for Order to Show Cause and for such other and further relief as the Court deems just and appropriate.

SHUGHART THOMSON &
KILROY, P.C.

By:
/s/ Robert A. Henderson
ROBERT A. HENDERSON #28566
JOSEPH J. ROPER #36995
120 West 12th St., Suite 1500
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 Facsimile

and

ROBERT A. KNUTI
JOHN M. WULFERS
SUSAN P. JORDAN
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, IL 60603
(312) 443-0700
(312) 443-0570 Facsimile

ATTORNEYS FOR DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, SUED HEREIN AS LLOYD'S SYNDICATE NO. 553

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion of Certain Lloyd's Underwriters to Dismiss First Amended Petition and Motion for Order to Show Cause was served by U.S. mail, postage prepaid, this 11th day of April, 1996, on:

James C. Owen, Esq.
McCarthy, Leonard, et al.
16141 North Outer Forty Drive, #300
Chesterfield, MO 63017
Attorneys for Receiver for Transit Casualty Company

/s/ Robert A. Henderson
ATTORNEYS FOR DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, SUED HEREIN AS LLOYD'S SYNDICATE NO. 553

APPENDIX F

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

Transit Casualty in Receivership
PLAINTIFF

VS.

Certain Underwriters at Lloyds of London who are members of Syndicate No. 553, as subscribers to contracts of reinsurance with Transit Casualty Company, and

C. J. Warrilow, an Underwriter at Lloyds of London, individually, and on behalf of Certain Underwriters at Lloyds of London who are members of Syndicate No. 553

DEFENDANTS

Cause No.
CV185-1206 CC;
Circuit Number 595-2CC
Transit Docket

Cole COUNTY

Byron Kinder, JUDGE

DIVISION NO. II
APPELLATE NO.

NOTICE OF APPEAL TO MISSOURI COURT OF APPEALS

WESTERN DISTRICT

NOTICE IS GIVEN THAT all defendants

APPEAL TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT.

8-28-96

DATE NOTICE OF APPEAL FILED (TO BE FILLED IN BY CLERK'S OFFICE)

/s/ Donald C. Otto, Jr.
SIGNATURE OF ATTORNEY OR APPELLANT

CASE INFORMATION – THIS INFORMATION MUST BE TYPED

APPELLANT'S ATTORNEY
Donald C. Otto

STREET ADDRESS
235 E. High Street

CITY Jefferson City STATE MO ZIP CODE 65102

TELEPHONE NUMBER 573/636-8135

NAME OF APPELLANT
Certain Underwriters at Lloyds of London, et al.

STREET ADDRESS
CITY London STATE England ZIP CODE

DATE OF JUDGMENT July 19, 1996

[X] COURT TRIAL [ ] JURY TRIAL

[N/A] NUMBER OF DAYS OF TRIAL

BRIEF DESCRIPTION OF CASE Dispute over reinsurance obligations. Defendants contend that this case is required to be arbitrated by agreement of the parties. This appeal is from the trial court's refusal to compel arbitration and is therefore appealable under §435.440, R.S.Mo. 1994.

RESPONDENT'S ATTORNEY

James C. Owen; McCarthy, Leonard, et al.

STREET ADDRESS
16141 N. Outer Forty Drive, #300

CITY Chesterfield STATE MO ZIP CODE 63017

TELEPHONE NUMBER 314/532-7100

NAME OF RESPONDENT
Transit Casualty Company in Receivership

NAME OF COURT REPORTER

TELEPHONE NUMBER OF COURT REPORTER

DATE POST-TRIAL MOTION FILED N/A

DATE POST-TRIAL MOTION DECIDED N/A

JUDGMENT OR ORDER APPEALED FROM: (ATTACH A COPY OF JUDGMENT)

Ordered entered July 19, 1996.

DIRECTIONS TO CLERK

THE CLERK IS REQUIRED TO MAIL A COPY OF THE NOTICE OF APPEAL AND CIVIL CASE INFORMATION FORM SUPPLEMENT BY CERTIFIED MAIL TO THE ATTORNEYS OF RECORD OF ALL PARTIES OTHER THAN THOSE TAKING THE APPEAL, AND TO MAIL A COPY OF THE NOTICE OF APPEAL AND CIVIL CASE INFORMATION FORM SUPPLEMENT, TOGETHER WITH THE DOCKET FEE TO THE CLERK OF THE APPELLATE COURT. IF A PARTY DOES NOT HAVE AN ATTORNEY, THE NOTICE AND SUPPLEMENT MUST BE MAILED TO THE PARTY AT HIS LAST KNOWN ADDRESS. A COPY OF THE NOTICE OF APPEAL MUST BE SENT BY REGISTERED OR CERTIFIED MAIL TO THE ATTORNEY GENERAL WHEN THE APPEAL INVOLVES A FELONY. THE CLERK SHOULD THEN FILL IN THE MEMORANDUM BELOW. (SEE RULE 81.08 AND 30.01(h) AND (i).

MEMORANDUM OF THE CLERK

I HAVE THIS DAY MAILED BY CERTIFIED MAIL OR HAND DELIVERED A COPY OF THE WITHIN NOTICE OF APPEAL AND CIVIL CASE INFORMATION FORM SUPPLEMENT TO EACH OF THE FOLLOWING PERSONS AT THE ADDRESS STATED.

James C. Owen
McCarthy, Leonard, etc.
16141 N. Outer Forty
Dr. #300
Chesterfield, MO 63017
Attorney for Respondent

Donald C. Otto
235 E. High St.
Jefferson City, MO 65102
Attorney for Appellant

I HAVE ALSO MAILED A COPY OF THE NOTICE OF APPEAL AND CIVIL CASE INFORMATION FORM SUPPLEMENT TO THE CLERK OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, TOGETHER WITH THE DOCKET FEE DEPOSITED BY APPELLANT.

8-28-96
DATE

LINDA L. ROARK,
CIRCUIT CLERK

By /s/ Sharon Morgan
Deputy

F5

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD ___

CIVIL CASE INFORMATION FORM SUPPLEMENT

Please type or neatly print the information requested. This form must be filed with the Notice of Appeal (form 8-B) with the Circuit Clerk.

Transit Casualty in Receivership
Plaintiff

VS.

Certain Underwriters at Lloyds of London who are members of Syndicate No. 553, as subscribers to contracts of reinsurance with Transit Casualty Company, and

C.J. Warrilow, an Underwriter at Lloyds of London, individually and on behalf of Certain Underwriters at Lloyds of London who are members of Syndicate No. 553.

Defendants

James C. Owen
Attorney's Name

16141 N. Outer Forty Drive, #300
Street Address

Chesterfield 63017
City Zip Code

Donald C. Otto
Attorney's Name
235 E. High St.
PO Box 1069
Street Address
Jefferson City 65102
City Zip Code

Date Notice filed in Circuit Court 8-28-96

==========

The Record on Appeal will consist of a:

__XX__ Legal File Only or _____ Transcript and Legal File (This will include records filed pursuant to Rules 81.13 and 81.16)

FACTUAL BACKGROUND: (Events Giving Rise to Cause of Action)

Defendants contend that this suit must be submitted to arbitration pursuant to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Plaintiff claims Subsection 375.1188 R.S. Mo 1994 precludes arbitration. The trial court refused to compel arbitration, and this order is appealable under Subsection 435.440, R.S.Mo. 1994.

ISSUE(S): (Anticipated to be Presented by the Appeal; Appellant is Not Bound by this Designation)

Did the trial court err in refusing to compel arbitration on the ground that Defendants' rights under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was preempted by Missouri law?

Two (2) typewritten pages maximum

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI IN RE TRANSIT CASUALTY COMPANY IN RECEIVERSHIP CAUSE NO. CV185-1206CC

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, Defendant.	Case No.: CV595-2CC Transit Docket

ORDER

Defendants' Motion to Dismiss and to Compel Arbitration called, heard and denied. The clear and specific language of the reinsurance agreements, Article XVII, controls over the arbitration provision and permits Transit to litigate the claim of a failure to pay within this Court. Further, the Court believes that §375.1188 controls in this action over any other state or federal law and prohibits Defendants' motion to compel arbitration. Additionally, much of Plaintiff's requested relief is presently in the form of Motions for Contempt, which involves matters *sui generis* to this Court. Defendants' other pending motions are denied, subject, however, to counsels' agreement to depose Mr. Warrilow on or about August 2, 1996, in London.

SO ORDERED:

/s/ Byron L. Kinder
Honorable Byron L. Kinder

Dated: 7-19-96

APPENDIX G

TRANSIT CASUALTY IN RECEIVERSHIP, RESPONDENT

29604 JAMES CURTIS OWEN, PRIVATE ATTORNEY
SUITE 300, 16141 N OUTER FORTY DR.
CHESTERFIELD, MO 63017
(314) 532-0857

VS.

CERTAIN UNDERWRITERS AT LLOYDS OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, AND WARRILOW, C.J., AND UNDERWRITER AT LLOYDS OF LONDON, AND INDIVIDUALLY, AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYDS OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, APPELLANT

33844 DONALD CHARLES OTTO JR, PRIVATE ATTORNEY
235 EAST HIGH STREET, PO BOX 1069, JEFFERSON CITY, MO 65102
(573) 636-5226

CASE TYPE – CIVIL APPEAL FILED IN THIS COURT

NATURE – MISCELLANEOUS – OTHER

COUNTY – COLE

CIR. COURT CASE NUM. CV185-1206 CC

CIRCUIT JUDGE BYRON L. KINDER

FILING FEE PAID

FILING DATE	FILING ATTORNEY	EVENT
09-28-96		APPEAL FILED IN CIRCUIT COURT
09-03-96		APPEAL FILED IN MISSOURI COURT OF APPEALS
	29604	JAMES CURTIS OWEN APPEARED: 08-28-96
	33844	DONALD CHARLES OTTO JR APPEARED: 08-28-96
08-28-96		SUPPLEMENT TO NOTICE OF APPEAL - LEGAL FILE ONLY
09-17-96	29604	MOTION FOR DISMISSAL JAMES CURTIS OWEN (SUGGESTIONS IN SUPPORT FILED BY 29604 ON 09-17-96) (SUGGESTIONS IN OPPOSITION FILED BY 33844 ON 10-03-96) DENIED 10-07-96
09-20-96	33844	MOTION FOR EXTENSION OF TIME TO FILE SUGGESTION IN OPP. DONALD CHARLES OTTO JR SUSTAINED 09-30-96 EXTENDED TO 10-03-96
09-27-96		**RECORD ON APPEAL**
09-27-96		**** LEGAL FILE ONLY ****

10-04-96	33844	MOTION TO FILE SUPPLEMENTAL RECORD ON APPEAL DONALD CHARLES OTTO JR SUSTAINED 10-18-96 EXTENDED TO 10-18-96
10-18-96		**** APPELLANT SUPPLEMENTAL LEGAL FILE FILED ****
10-29-96	33844	MOTION FOR STAY OF PENDING CASE IN OTHER COURT DONALD CHARLES OTTO JR (SUGGESTIONS IN SUPPORT FILED BY 33844 ON 10-29-96 (SUGGESTIONS IN OPPOSITION FILED BY 29604 ON 11-15-96) DENIED 11-15-96
11-05-96	29604	MOTION TO FILE SUGG IN OPP OUT OF TIME JAMES CURTIS OWEN SUSTAINED 11-15-96 EXTENDED TO 11-15-96
11-20-96	33844	APPELLANT/RELATOR MOTION FOR EXTENSION OF TIME TO FILE BRF DONALD CHARLES OTTO JR (SUGGESTIONS IN OPPOSITION FILED BY 29604 ON 11-22-96) SUSTAINED 11-27-96 EXTENDED TO 12-20-96

11-26-96	33844	MOTION TO FILE REPLY SUGGESTIONS DONALD CHARLES OTTO JR DENIED 11-27-96
12-20-96	33844	APPELLANTS BRIEF FILED BY DONALD CHARLES OTTO JR
01-21-97	29604	RESPONDENTS BRIEF BY JAMES CURTIS OWEN
02-04-97	29604	MOTION TO TAKE JUDICIAL NOTICE OF EXHIBITS JAMES CURTIS OWEN (SUGGESTIONS IN SUPPORT FILED BY 29604 ON 02-04-97) (SUGGESTIONS IN OPPOSITION FILED BY 33844 ON 02-10-97) DENIED 02-14-97
02-04-97	29604	MOTION TO FILE SUPPLEMENTAL RECORD ON APPEAL JAMES CURTIS OWEN SUSTAINED 02-14-97 EXTENDED TO 02-14-97
02-05-97	33844	APPELLANTS REPLY BRIEF BY DONALD CHARLES OTTO JR
02-14-97		**** RESPONDENTS SUPPLEMENTAL LEGAL FILE FILED ***
02-14-97	29604	MOTION FOR LEAVE TO FILE REPLY SUGGESTIONS JAMES CURTIS OWEN DENIED 02-28-97

02-24-97	33844	MOTION FOR STAY/ CONTINUANCE IN APPELLATE COURT DONALD CHARLES OTTO JR SUSTAINED 02-26-97
02-24-97		**** JOINT MOTION ***
02-26-97		**** ORIG. DOCKETED FOR 3-6-97 B/F DIV. I: BRECK-SMART-SMITH
02-26-97		**** CONT.'D OFF DOCKET BECAUSE CASE IS NOW STAYED IN THIS CT.
04-09-97	33844	MOTION FOR STAY/ CONTINUANCE IN APPELLATE COURT DONALD CHARLES OTTO JR SUSTAINED 04-11-97
04-09-97		**** JOINT MOTION ***
05-05-97	33844	JOINT MOTION TO END STAY OF PROCEEDINGS DONALD CHARLES OTTO JR (SUGGESTIONS IN SUPPORT FILED BY 29604 ON 05-05-97) SUSTAINED 05-07-97
05-28-97		CASE DOCKETED FOR 07-09-97 DIVISION I
05-23-97		**** DIV I: SMITH-BERREY-ELLIS
07-09-97		**CASE SUBMITTED**
07-09-97		*(A&S-03)

07-15-97	****CT ALLOWED LETTER BRIEF MAY BE FILED BY 7-25-97
07-15-97	UNDER SUBMISSION

APPENDIX H

IN THE CIRCUIT COURT OF COLE COUNTY STATE OF MISSOURI

MARY C. HALL, Acting Director Division of Insurance Department of Economic Development State of Missouri Plaintiff, v. TRANSIT CASUALTY COMPANY, Defendant, and TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, et al., Defendants.	Cause No.: CV185-1206CC Division II Cause No. CV595-2CC Transit Docket

ORDER FOR SECURITY

The parties appeared in order to clarify the Order of Reference to Special Master James Dalton. The Court has

considered the arguments of the parties and the entire court record, and, based thereon, finds that the hearing set on September 16th is not necessary to this Receivership Court's determination that Defendants should post Letters of Credit or other sufficient security under the contract and Pre-Answer Security law to protect the creditors of the Transit estate. The Court also takes judicial notice that on August 30, 1996, the governing body of Lloyd's agreed to go forward with the Reconstruction and Renewal plan, also known as Equitas. Based on the record, the foregoing action is what any reasonable and prudent judge would do in the same or similar circumstances.

Although the Court agreed to hear additional evidence on September 16th, counsel for Defendants has told the Court that he only intends to call one or more witnesses from the Missouri Department of Insurance. No evidence such a witness could offer should alter this Court's decision that Lloyd's Syndicate No. 553 (Lloyd's) is not authorized in Missouri or that Lloyd's is not in compliance with the laws of this State governing reinsurers such as Lloyd's. The trust instrument, on its face, does not comply with the statutes. Lloyd's counsel further indicated that, because of this Court's decision to refer this case to a Special Master, Lloyd's would await that opportunity to present its full legal arguments on the security issues to the Special Master. This Court does not want to hold another "interim" hearing for Lloyd's. Lloyd's has been given the opportunity to present evidence to this Court as to why it should be deemed authorized and has chosen not to do so. Since Lloyd's desires to wait and present its "full" evidence to the

Special Master, it must post security until such time as this Court or any appellate court rules otherwise.

The Court will stay this Order for five days to afford Lloyd's the opportunity to file an Affidavit from the witness or witnesses it proposed to call from the Division of Insurance as to Lloyd's authorized status in Missouri, which is relevant to the security issues. If such Affidavit is filed, the Court will review that evidence and reconsider its ruling, if warranted.

Lloyd's Motion to Dismiss is overruled and it should proceed with all reasonable diligence to present its case to the Special Master.

Therefore, Plaintiff's Motion to Enforce the Pre-Answer Security count of its Second Amended Petition is sustained as to the paid balances and interest only, totalling $656,935. Plaintiff's Motion for Contempt for Lloyd's failure to post security in the amount of $7,675,201 under the contract as an asset of the Transit estate is also sustained. This security will stay in force until further order of this Court or modification by a final appellate court opinion.

So Ordered this 13th day of September, 1996.

/s/ Byron Kinder
BYRON L. KINDER
CIRCUIT JUDGE

APPENDIX I

ARTICLE XVII – SERVICE OF SUIT CLAUSE

In the event of the failure of the Reinsurer to pay any amount claimed to be due hereunder, the Reinsurer will, at the request of the Reinsured, submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accord with the law and practice of such Court.

Service of process in such suit may be made upon MENDES AND MOUNT, Three Park Avenue, New York, New York, 10016 and in any suit instituted against the Reinsurer under this Agreement the Reinsurer will abide by the final decision of such Court or of any reviewing Court.

The above named are authorized and directed to accept service of process on behalf of the Reinsurer in any such suit and/or upon the request of the Reinsured to give a written undertaking to the Reinsured that they will enter an appearance upon the Reinsurer's behalf in the event such suit is instituted.

Further, pursuant to any statue [sic] of any State, territory, or District of the United States which makes provision therefore [sic], the Reinsurer hereby designates the Superintendent, Commissioner, Director or Insurance or Secretary of State of any State of the United States or other officer specified for that purpose in the Stature [sic], or his successor or successors in office, as their true and lawful attorney upon whom may be served any

by or on behalf of the Reinsured or any beneficiary hereunder arising out of this Agreement, and hereby designates the above named as the person to whom said officer is authorized to mail such process or a true copy thereof. Any action by the Reinsurer against the Reinsured shall be instituted in a court in a State of the United States in which the Reinsured is admitted to do business, including the District of Columbia.

ARTICLE XIX - INSOLVENCY

In the event of the insolvency of the Reinsured, proceeds that would otherwise be distributed to the Reinsured in accordance with the terms and provisions of this Agreement shall be payable directly to its liquidator, receiver, conservator or statutory successor on the basis of the liability of the Reinsured without diminution because of the insolvency of the Reinsured or because the liquidator, receiver, conservator or statutory successor of the Reinsured shall give written notice to the Reinsurer(s) of the pendency of a claim against the Reinsured indicating the Policy reinsured which claim would involve a possible liability on the part of the Reinsurer(s) within a reasonable time after such claim is filed in the conservation or liquidation proceedings or in the receivership, and that during the pendency of such claim the Reinsurer(s) may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated, any defense or defenses that it may deem available to the Reinsured, its liquidator, receiver, conservator, or statutory successor. The expense thus incurred by the Reinsurer(s) shall be charged, subject to the approval of the Court, against the Reinsured as part of the expense of conservation or liquidation to the extent of a pro-rata share of the benefit which may accrue to the Reinsured solely as a result of the defense undertaken by the Reinsurer(s).

Where two or more Reinsurer(s) are involved in the same claim, and the majority in interest elect to interpose defense to such claim, the expense shall be apportioned to accord with the terms of this Agreement as though such expenses had been incurred by the Reinsured.

ARTICLE XXI – CONTROLLING LAW

This Agreement shall be interpreted in all respects in accord with the laws of the State of Missouri, or in the case of international matters the laws of the United States of America.

ARTICLE XXI

CONTROLLING LAW:

This Agreement shall be interpreted in all respects in accord with the laws of the State of California, or in the case of international matters the laws of the United States of America.

ARTICLE XXII – ARBITRATION CLAUSE

All disputes or differences arising out of this Agreement shall be submitted to the decision of two Arbitrators, one to be chosen by each party, and in the event of the Arbitrators failing to agree, to the decision of an Umpire to be chosen by the Arbitrators. If either of the parties fails to appoint an Arbitrator within one month after being required by the other party in writing to do so, or if the Arbitrators fail to appoint an Umpire within one month of a request in writing by either of them to do so, such Arbitrator or Umpire, as the case may be, shall at the request of either party be appointed by a justice of the Supreme Court of the State of California.

The Arbitration proceedings shall take place in Los Angeles, California, unless otherwise agreed. The applicant shall submit its case within one month after the appointment of the Court of Arbitration, and the respondent shall submit his reply within one month after the receipt of the claim. The arbitrators and Umpire are relieved from all judicial formality and may abstain from following the strict rules of law. They shall settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal.

Each party shall bear the expenses of its Arbitrator and shall jointly and equally share with the other the expense of the Umpire and of the Arbitration.

This Clause shall survive the termination of this Agreement.